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No. 94-440

In The

Supreme Court of the United States

October Term, 1994

FRANK SETOLA, *et al.*,

Petitioners,

vs.

BOB SCHMIDT CHEVROLET, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT GENERAL MOTORS CORPORATION

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QUESTIONS PRESENTED

As viewed by respondent General Motors Corporation, including Hydramatic, a division of General Motors Corporation, the instant petition presents the following questions:

1. Whether either the district court or the court of appeals was required to presume that there was a "genuine issue as to any material fact" that precluded summary judgment.

2. Whether after the district court has correctly entered summary judgment in favor of a defendant and has then correctly denied the plaintiffs' motion for reconsideration and also after the court of appeals has correctly affirmed that judgment and has then correctly refused the filing of an untimely petition for rehearing *en banc*, there is any need for further review by this Court.

3. Whether after both the district court and the court of appeals have fully examined and considered plaintiffs' asserted claim against a defendant and have rendered correct decisions adverse to plaintiffs, this Court should be persuaded either by unsupported and unsupportable arguments or by meaningless arguments to permit further review and thereby unnecessarily to burden further its docket.

PARTIES TO THE PROCEEDING

The petition does not have a statement as to parties. The names of the parties appearing in the petition's caption are only partially correct.

The petitioners, plaintiffs in the district court, are Frank and Cheryl Setola, husband and wife, former Ohio residents who now reside in New Jersey.

There are two respondents, defendants in the district court. The first respondent is Bob Schmidt Chevrolet, Inc., an Ohio corporation. The second respondent is General Motors Corporation, a Michigan corporation. The petition incorrectly names Hydramatic as a separate respondent, but Hydramatic is a division of General Motors Corporation, and Hydramatic is not a separate entity.

Except where the context otherwise requires, petitioners will be referred to as "plaintiffs"; respondent Bob Schmidt Chevrolet, Inc. will be referred to as either "defendant Schmidt" or "Schmidt"; and General Motors Corporation will be referred to as either "defendant General Motors" or "General Motors."

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OPINIONS BELOW

The plaintiffs' Appendix does not include all of the appropriate decisions of the United States District Court for the Northern District of Ohio, Western Division. As to defendant General Motors, the order journalizing admissions and the summary judgment opinion of the district court should be included; they have not been reported, and they are printed and attached hereto as Opposition Appendix A, at 1a, and Opposition Appendix B, at 4a, respectively. Other decisions by the district court have also not been reported, and they are Appendix 3, 4, and 5 to the petition. The memorandum opinion of the United States Court of Appeals for the Sixth Circuit has not been reported, is not recommended for publication, and is Appendix 1 to the petition. The Sixth Circuit's affirmance of the district court's decision is noted under "Decisions Without Published Opinions" at 27 F.3d 567 (6th Cir. 1994). The Sixth Circuit's order that the untimely petition for rehearing *en banc* not be accepted for filing has not been reported and is Appendix 2 to the petition.

STATEMENT OF THE CASE

A. Introduction

This instant action arises from a 1986 rear-ender motor vehicle accident case.

Plaintiffs originally filed their complaint in the Court of Common Pleas, Lucas County, Ohio, and later dismissed and refiled in the district court on diversity grounds. In the instant action, Frank and Cheryl Setola, husband and wife, filed a negligence action against the car dealership, defendant Schmidt. This claim was based on the averment that an employee of defendant Schmidt instructed Mr. Setola to operate the vehicle at a time when the dealership should have known that the brake system was defective. In addition, a separate products liability claim was

averred against the car manufacturer, defendant General Motors. This collateral claim was based on an averment that the vehicle brake system was defective because it contained a contaminant that caused the brake system to fail.

As detailed in the chronological history of filings, the only circumstances pertinent to plaintiffs' petition against defendant General Motors concern whether the district court's journalization of deemed admissions, subsequent grant of summary judgment based thereon, and denial of plaintiffs' belated motion to withdraw the deemed admissions was an abuse of discretion. More specifically, the issue is whether the district court abused its discretion in denying plaintiffs' motion to withdraw the journalized deemed admissions which was filed approximately seven months *after* the district court had entered summary judgment on behalf of defendant General Motors.

Yet, plaintiffs' statement of the facts and presentation of questions for review are filled with recitations of affidavit testimony and other irrelevancies that have no relationship whatsoever to the journalized deemed admissions thus resulting in discussions in the petition that are not germane to General Motors. In addition, when attempting to decipher out the circumstances applicable to General Motors, one also becomes aware that plaintiffs' petition is replete with inaccuracies and misstatements.

In order to place the questions presented for review in proper perspective, it is necessary to review some facts and some related proceedings below from many years ago. Unfortunately, since plaintiffs' supposed statement of the case in their petition is only partially complete, at best, this statement, for this additional reason, is longer than would normally be preferred. For the convenience of the Court, the facts and the related proceedings below covering this lengthy time span will generally be summarized in their approximate chronological order.

B. Accident History

On December 3, 1985, Mr. Setola purchased a 1985 Corvette from Schmidt. On January 30, 1986, Mr. Setola, while operating his Corvette, was involved in a motor vehicle accident in Toledo, Ohio. At that time, he hit the rear end of another vehicle, which was stopped at an intersection.

At the time of the accident, Mr. Setola had already put 7,194 miles on his Corvette in a little over a month of ownership. During this time of ownership, Mr. Setola's vehicle was never serviced or examined by anyone from General Motors. Throughout this litigation, and as demonstrated below, plaintiffs' basic contention has been that the Corvette's brakes were defective when Schmidt returned the Corvette to Mr. Setola on January 29, 1986, not at the time it left General Motors' hands in August, 1985.

C. Proceedings Below

On January 20, 1988, plaintiffs filed their complaint against defendants Schmidt and General Motors in the Court of Common Pleas, Lucas County, Ohio. On June 22, 1989, the state action was dismissed by plaintiffs with a right to refile. On June 22, 1990, plaintiffs, having moved to New Jersey, refiled their action in the United States District Court for the Northern District of Ohio, Western Division, and asserted jurisdiction on diversity grounds. Answers were then filed.

On October 12, 1990, the district court issued its pretrial order delineating the litigation management schedule, which included a discovery deadline of June 9, 1991, and a trial date of September 9, 1991. On November 14, 1990, General Motors served its discovery and requests for admission on plaintiffs. Contrary to plaintiffs' reference to General Motors' discovery as "voluminous" (Petition, at iv), that discovery and those requests for admissions were limited to questions primarily pertaining to the basis of plaintiffs' product defect allegations.

That discovery and those requests for admissions, which were designed to narrow the issues regarding the alleged product defect, specifically asked plaintiffs to admit that the vehicle in question was not defective in manufacture or design. In addition, the fourth request for admission asked plaintiffs to admit that Frank Setola's own careless conduct was the cause of the January 30, 1986, accident. These requests for admissions are the core of plaintiffs' appeal as to General Motors. As the district court stated, it is those admissions which "cut at the heart of plaintiffs' claims and allowed General Motors to succeed on its motion for summary judgment." Appendix, at 41, August 4, 1992, Memorandum and Order.

Those four requests for admissions are as follows:

> REQUEST FOR ADMISSION NO. 1: Please admit there was and is no privity of contract between plaintiffs and General Motors Corporation in respect of this 1985 Corvette.
>
> REQUEST FOR ADMISSION NO. 2: Please admit that this 1985 Chevrolet Corvette was not defectively designed by defendant G.M.
>
> REQUEST FOR ADMISSION NO. 3: Please admit that this 1985 Chevrolet Corvette was not defectively manufactured by defendant G.M.
>
> REQUEST FOR ADMISSION NO. 4: Please admit that plaintiff Frank Setola's failure to maintain assured clear distance ahead caused the accident averred in plaintiffs' complaint.

Opposition Appendix B, at 7a-8a, November 4, 1991, Memorandum and Order. Four months passed after service of this discovery and requests for admissions. Plaintiffs did nothing!

On March 18, 1991, and with no action of any type by plaintiffs, General Motors filed a motion to journalize the

admissions. Plaintiffs still did not serve their responses, nor did they ask for leave to do so. Contrary to plaintiffs' assertion at page 9 of the petition, plaintiffs did not request an extension of time to answer the discovery or the four requests for admissions. Instead, plaintiffs' only response was thereafter to request an extension of time to oppose this defendant's motion to journalize the admissions.

On April 10, 1991, the district court entered its order and stated:

> In the case *sub judice,* defendants submit that plaintiffs have failed to respond to the requests served upon them. Plaintiffs seek an extension of time until April 17, 1991 to respond to defendants' motion. Plaintiffs had until December 17, 1990 to respond to the requests or in the alternative seek an extension of time as to the requests. Plaintiffs did neither. As they failed to respond in a timely fashion the Court finds defendants' motion well taken and the requests are deemed admitted.

Opposition Appendix A, at 3a, April 10, 1991, Memorandum and Order. Despite the binding effect of the district court's order and its significant impact, plaintiffs still did nothing. An additional two months passed.

On June 12, 1991, defendant General Motors moved for summary judgment. That motion and short memorandum in support were based upon the district court's journalization of the deemed admissions; specifically, that the 1985 Corvette was not either defectively designed or defectively manufactured by General Motors, and that plaintiff Frank Setola's failure to maintain an assured clear distance ahead caused the accident in question.

Plaintiffs continued to do nothing with respect either to the district court's order of April 10, 1991, or to defendant General

Motors' motion for summary judgment of June 12, 1991. It was only after doing nothing, following the district court's order of April 10, 1991, and defendant General Motors' June 12, 1991, motion for summary judgment, that plaintiffs on June 17, 1991, moved to vacate the September 9, 1991, trial date.

On July 1, 1991, plaintiffs filed their opposition to defendant General Motors' summary judgment motion. Their opposition consisted primarily of inadmissible affidavits which were, in large part, unrelated to the claim against General Motors. Further, plaintiffs did not submit any affidavits in attempting to justify the unexcused delays in answering the discovery and the four requests for admission. On July 31, 1991, General Motors filed a reply memorandum and a motion to strike the affidavits attached to plaintiffs' opposition. In its reply brief, General Motors noted that Lawrence F. Wilson, plaintiffs' investigator and purported expert, stated that it was "impossible" to render an opinion as to the product defect in the vehicle. Appendix, at 33, October 14, 1992, Memorandum and Order.

On November 4, 1991, the district court entered its order granting General Motors' motion for summary judgment and stated:

> Plaintiffs attempt to overcome the admissions through a series of affidavits which defendants have moved to have stricken for noncompliance with the Fed.R.Civ.P. 56(e). The Court notes that the admissions were served upon plaintiffs on November 13, 1990. It was not until April 5, 1991, almost five months later, that plaintiffs moved for an extension of time to respond to the admissions. (sic) Thereafter, on April 10, 1991, the Court granted defendants' motion to admit the admissions.
>
> . . .
>
> Once such matters are admitted, summary judgment can be granted on the basis of the admissions.

> (Citations omitted.) Default admissions cannot later be attacked on the basis of affidavits contained within an opposition to summary judgment. *O'Bryant v. Allstate Ins. Co.*, 107 F.R.D. 45 (D. Conn. 1985).
>
> While the effect of the above admissions is clear, to allow plaintiffs at this juncture to attack the issues contained in the admissions is to disregard the letter of the law and reward plaintiffs for their inaction. Accordingly, the Court finds that the admissions are properly applied to the motion for summary judgment. There exists no genuine issue of material fact and as a matter of law, General Motors is entitled to summary judgment on all claims.

Opposition Appendix B, at 9a-10a, November 4, 1991, Memorandum and Order.

On December 6, 1991, which was after defendant General Motors' involvement in this action had been completely adjudicated and terminated by the district court, defendant Schmidt filed its motion for summary judgment. On January 7, 1992, plaintiffs filed their opposition, including a variety of incompetent and inadmissible affidavits, to defendant Schmidt's motion for summary judgment.

On June 17, 1992, approximately 12 months after General Motors had filed its motion for summary judgment and approximately seven months after the district court had entered summary judgment in favor of defendant General Motors, plaintiffs filed a Rule 36(b) motion to withdraw admissions and vacate the summary judgment in favor of General Motors. On July 7, 1992, General Motors filed its brief in opposition.

On August 4, 1992, the district court, upon consideration of the arguments, denied plaintiffs' motion to withdraw the admissions and to vacate the summary judgment. In denying plaintiffs' motion, the district court stated:

> The purpose of admissions is to facilitate proof and narrow the issues. Fed. R. Civ. P. 36 advisory committee's note. The Court recognizes the importance of resolving the action on the merits but in this case finds that the reliance of GM upon the deemed admissions, plaintiffs' dilatory actions, and the purpose of admissions would be severely undermined were the Court to allow withdrawal at this late date.

Appendix, at 42-43, August 4, 1992, Memorandum and Order.

Unwilling to face reality, plaintiffs repeatedly filed additional motions asking the district court to reconsider their earlier arguments. Two months later, on October 14, 1992, the district court denied plaintiffs' additional motions and entered summary judgment on behalf of defendant Schmidt. Appendix, at 14.

Thereafter, plaintiffs filed yet another redundant motion. On October 30, 1992, plaintiffs served their motion to amend or alter the judgment as to both defendants. The defendants separately responded, but each emphasized that plaintiffs' arguments were duplicative of prior arguments. On January 26, 1993, Judge Dowd, then sitting for the deceased Judge Walinski, considered these matters and issued his decision denying plaintiffs' motion. Appendix, at 5.

On February 24, 1993, plaintiffs filed a notice of appeal to the Sixth Circuit. Extensive briefs were then filed with the Sixth Circuit, and oral arguments were thereafter heard by the Sixth Circuit. On May 26, 1994, the Sixth Circuit, by a *per curiam* memorandum opinion, affirmed the district court's judgment as to both defendants. Appendix, at 1-2; May 26, 1994, Sixth Circuit Court of Appeals Memorandum Opinion.

Thus, after filing numerous motions and briefs and after the issues were reviewed by two separate district court judges and the Sixth Circuit Court of Appeals, the journalized admissions and

General Motors' motion for summary judgment based thereon were upheld. On June 16, 1994, plaintiffs filed a petition for rehearing *en banc*, which was dismissed for having been filed out-of-rule. Appendix, at 3.

On August 24, 1994, an incomplete petition for certiorari was filed with this Court, and it was later amended on September 8, 1994, in order to attempt to comply with this Court's rules of procedure. On its face, the petition shows no good reason for this Court to review the decision of the Sixth Circuit. For the additional reasons set forth below, review by this Court is neither appropriate nor warranted.

SUMMARY OF ARGUMENT

As to defendant General Motors, the decisive facts and proceedings are either admitted by plaintiffs or are not disputed (or cannot be disputed) by them. Before the district court, the plaintiffs completely and totally failed to establish that a defect existed at the time of manufacture of the subject vehicle. In addition, plaintiffs judicially admitted that the subject vehicle was free of defects in design and manufacture and that Mr. Setola's failure to provide an assured clear distance caused the involved accident. The summary judgment rendered by the district court and its affirmance by the court of appeals were both legally correct. Indeed, all of the judges below have so agreed.

Like plaintiffs' belated and misguided efforts to develop post-judgment genuine issues of material fact, plaintiffs' attempts to challenge the applicable law are faulty and have correctly been so held below. There is no unusual feature in this case to attract or merit the attention of, and further consideration by, this Court. It is more than time for the judicial process to end as to this dispute. Certiorari should be denied.

REASONS FOR DENYING THE PETITION

In the initial pages of the petition, eight self-proclaimed "questions presented for review" are stated, and they ramble for approximately six and one-half pages. Petition, at i-vii. Contrary to Rule 14.1(a) of the Rules of the United States Supreme Court, these questions are neither "short" nor "concise," but rather they are "argumentative" and "repetitious" and are also expressed in "unnecessary detail." In the text of the petition, and even though eight so-called questions are presented, there are only four so-called arguments presented. Petition, at 24-48. It is left to the reader's imagination, ingenuity, and mental dexterity to attempt to determine which of these four so-called arguments are intended to apply to which of the eight so-called questions, if any, and to which of the defendants, if any. And, even if a nimble reader could get past these hurdles, the petition still does not provide to such a reader "a ready and adequate understanding of the points requiring consideration." Sup. Ct. R. 14.5. The reader is then further hampered by the petition's additional failures to meet the requirements of "accuracy, brevity, and clearness." Sup. Ct. R. 14.5. Without more, these reasons are "sufficient" for "denying the petition." Sup. Ct. R. 14.5. If the petition is not so denied, it should then be denied for the additional reasons set forth below. Sup. Ct. R. 14.

As to defendant General Motors, all of the pertinent circumstances were carefully considered and determined by both the district court and the court of appeals. Additionally, well-settled principles of law also govern all of the matters set forth in the petition as to defendant General Motors. The applicability of those principles here is heavily underscored by the entire record in the instant action. Those principles display that the decision of the court of appeals in affirming judgment for defendant General Motors was correct and proper. As to defendant General Motors, this is simply not the type of case that either demands or requires this Court's precious time. For the additional reasons set forth below, the petition should be denied.

I. NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS WAS REQUIRED TO PRESUME THAT THERE WAS A "GENUINE ISSUE AS TO ANY MATERIAL FACT" THAT PRECLUDED SUMMARY JUDGMENT.

Rule 56 of the Federal Rules of Civil Procedure provides in most pertinent parts:

> The judgment sought *shall be rendered forthwith* if the pleadings, depositions, answers to interrogatories, and *admissions* on file, together with the affidavits, if any, show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to a judgment *as a matter of law.*

Fed. R. Civ. P. 56(c) (emphasis added).

> When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading*, but the adverse party's response, by affidavits or as otherwise provided in this rule, *must* set forth *specific* facts showing that there is a genuine issue for trial. If the adverse party does not so respond, *summary judgment*, if appropriate, *shall be entered against the adverse party.*

Fed. R. Civ. P. 56(e) (emphasis added). In addition to the language of Rule 56 itself, there are three seminal decisions on it by this Court: *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Each of these three decisions fully supports the decisions of both the district court and the Sixth Circuit in the instant action.

As shown, Rule 56(c) by its terms provides that summary

judgment can be based upon deemed admissions, and it has been repeatedly held that deemed admissions can demonstrate the want of genuine issues of material fact on which a summary judgment may be premised. By its terms, Rule 36(a) also provides in pertinent part that "[e]ach matter of which an admission is requested shall be separately set forth. The matter is deemed admitted, unless thirty (30) days after service of the request . . . , the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter. . . ."

Here, the district court correctly and properly journalized plaintiffs' deemed admissions and then applied those admissions in entering summary judgment in favor of defendant General Motors. Months later, plaintiffs apparently recognized that, with the journalized admissions in effect, the district court had correctly and properly entered summary judgment in favor of defendant General Motors. With such recognition, plaintiffs began their post-judgment attack on the journalized admissions, and they now contend that the district court erred in denying their tardy and otherwise ineffective motion to withdraw those journalized admissions.

In a products liability claim, plaintiffs have the burden of proving: (1) the existence of a defect, (2) that the defect existed at the time it left the manufacturer's hands, and (3) that the defect was the proximate cause of plaintiffs' injuries. *State Farm Fire & Casualty Co. v. Chrysler Corp.*, 37 Ohio St. 3d 1, 523 N.E.2d 489 (1988). Unable to prove each of the above elements, plaintiffs have ignored some of the issues by attempting to direct this Court's attention to the third element above, rather than to each required element of their claim. However, plaintiffs' argument not only fails because there is no genuine issue of material fact as to the element of causation, but also because plaintiffs have failed to establish the other requisite elements of their claim.

First, plaintiffs failed to establish a product defect, instead admitting that the Corvette was not defectively designed or

manufactured by General Motors, and then further admitting that Mr. Setola's failure to provide an assured clear distance caused the accident. Plaintiffs cannot avoid these initial admissions by selectively choosing to discuss Mr. Setola's admission that he caused the accident and ignoring the initial admissions that the vehicle was not defective. Moreover, plaintiffs' initial expert, Lawrence F. Wilson, P.E., concluded that it was "impossible" to establish a product defect. Appendix, at 33, October 14, 1992, Memorandum and Order.

Second, plaintiffs also failed to establish that the product defect existed at the time of manufacture. As to defendant General Motors, it is, as a matter of law, not sufficient to establish that a defect, if one, might have existed at some later time. Indeed, plaintiffs' own arguments belie any ability to establish the second requisite element, and they have conceded that their product claim is based on an alleged defect that exited on January 29, 1986, approximately six months after the Corvette was manufactured by General Motors and approximately a month (and also some 7,194 miles) after it was purchased from Schmidt. In their brief to the Sixth Circuit, plaintiffs expressly stated:

> *We claim the Corvette was defective when Mr. Setola received it on January 29, 1986, the day before the injury,* and that Bob Schmidt Chevrolet should have warned him, and Mr. Setola would not have driven the Corvette on the occasion which resulted in his injury.

Brief of Plaintiffs-Appellants Frank Setola and Cheryl Setola, filed with the Sixth Circuit Court of Appeals, at 27 (emphasis added). Accordingly, as to defendant General Motors, plaintiffs have conceded that the alleged defect did not exist at the time of manufacture, and they cannot establish the second element of their product claim. *See, State Farm Fire & Casualty Co. v. Chrysler Corp.*, 37 Ohio St.3d 1, 523 N.E.2d 489 (1988).

Third, the district court stated: ". . . as to the product liability

claim, the Court must also find in favor of the defendant on the issue of proximate cause as there is an absence of evidence to the contrary." Appendix, at 33, October 14, 1992, Memorandum and Order.

Under all of the present circumstances, an exhaustive recapitulation, especially in view of the journalized admissions, is not needed. Here, the claim which plaintiffs have attempted to assert against defendant General Motors has been made from whole cloth. Fortunately, however, an expensive, time-consuming, and unwarranted trial of this meritless action is not required. The plaintiffs simply could not make "genuine" issues of "material" facts from their whole cloth to preclude judgment. Unsubstantiated, self-serving declarations and the like are not sufficient substitutes for "genuine issue[s] as to any material fact." Similarly, and also contrary to plaintiffs' transparent assertions, disputes over incidental and insignificant matters, which occur in virtually all litigation, are not controlling.

In the instant action, neither the district court nor the court of appeals was required to presume that there was a "genuine issue as to any material fact" that precluded judgment for defendant General Motors. Before the district court, plaintiffs, in the face of the involved journalized admissions, did not, and could not, "make a showing sufficient to establish the existence" of each of the essential elements of their case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In so failing, plaintiffs have already taken more than their share of the resources and energies of the judicial system and their opposing litigants. By the petition, this Court, although already needlessly and unjustifiably burdened by plaintiffs, now has an opportunity to promote further the interests and administration of justice by endorsing the usages of the judicial procedures used by both the district court and the court of appeals. This Court should now take full advantage of this opportunity by declining further review of the decisions below.

II. AFTER THE DISTRICT COURT HAS CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF A DEFENDANT AND HAS THEN CORRECTLY DENIED THE PLAINTIFFS' MOTION FOR RECONSIDERATION AND ALSO AFTER THE COURT OF APPEALS HAS CORRECTLY AFFIRMED THAT JUDGMENT AND HAS THEN CORRECTLY REFUSED THE FILING OF AN UNTIMELY PETITION FOR REHEARING *EN BANC*, THERE IS NO NEED FOR FURTHER REVIEW BY THIS COURT.

Plaintiffs' motion to withdraw their admissions, filed approximately seven months after the district court had entered summary judgment in favor of defendant General Motors, is governed by Rule 36 of the Federal Rules of Civil Procedure. Rule 36(b) states in pertinent part:

> (b) **Effect of Admission**. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. . . .

Fed. R. Civ. P. 36(b).

Rule 36(b) empowers the district court with substantial discretion in deciding whether to allow withdrawal of an admission. Vesting district courts with such discretionary power to deny a motion to withdraw is essential in order for Rule 36 admissions effectively to narrow issues and facilitate the resolution of claims. Fed. R. Civ. P. 36, Advisory Committee Note

of 1970.This function is lost if deemed admissions can later be challenged without justification. To that end, numerous courts have denied a party's motion to withdraw in order to give effect to the meaning and spirit behind Rule 36 and also to prevent the prejudice caused by the withdrawal of admissions. *See Developments in the Law-Discovery*, 74 Harv. L. Rev. 940, 969-70 (1961), fn 1, *infra*, at 18.

In denying a party's motion to withdraw under Rule 36(b), other courts, as well as the district court in its November 4, 1991, order, have also acknowledged and accepted the results in doing so. In particular, the courts have recognized that the enforcement of Rule 36 admissions may properly serve to terminate an action in the case of summary judgment proceedings:

> To permit plaintiff now to contest in a Rule 56 procedure a matter which has been concluded under Rule 36 would permit plaintiff to subvert the purpose of Rule 36 by simply ignoring it. Allowing such a result would render Rule 36 meaningless. This could not have been the intention in the adoption of the rule. (Citation omitted.) It will not be the result permitted in this case. The clear intent may be found in the amendment adding Rule 36(b) in 1970. While the loss to a party of his right to contest a matter on its merits is not to be treated lightly, where that loss results from the party's own failure to file an answer to requests for admission and further its failure to utilize the procedures provided in Rule 36 to rectify the deficiency, the loss is a casualty of the court's obligation to process cases to disposition in an orderly, effective, expeditious manner and in accordance with its published rules.

O'Bryant v. Allstate Ins. Co., 107 F.R.D. 45, 48 (D. Conn. 1985).

Rule 36(b) sets forth a two-part test that empowers a court to permit withdrawal or amendment of admissions only after

determining: (1) that the presentation of the merits of the action will be subserved; and (2) that the party who obtained the admission will not be prejudiced. As the district court noted in this action, even if both prerequisites of Rule 36 are met, a district court, in the exercise of its discretion, may still properly refuse to permit withdrawal. Appendix, at 43-44, August 4, 1992, Memorandum and Order, at 4. In confirming these principles, the Second Circuit in *Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650 (2d Cir. 1983), stated:

> "[T]he court *may permit* withdrawal [of admissions] when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." Fed.R.Civ.P. 36(b) (emphasis added). Thus, the court has the power to make exceptions to the Rule only when (1) the presentation of the merits will be aided *and* (2) no prejudice to the party obtaining the admission will result. Because the language of the Rule is permissive, the court is not required to make an exception to Rule 36 even if both the merits and prejudice issues cut in favor of the party seeking exception to the rule (citation omitted). Vesting such power in the district court is essential for Rule 36 admissions effectively to narrow issues and speed the resolution of claims. (Citation omitted.)

703 F.2d at 652. The standard is even higher when the case has proceeded to trial, when a district court may grant the motion only if it finds that so doing would be necessary to prevent "manifest injustice." Fed. R. Civ. P. 36(b). *See Brook Village North Associates v. General Electric Co.*, 686 F.2d 66 (1st Cir. 1982).

In *Weva Oil Corp. v. Belco Petroleum Corporation*, 68 F.R.D. 663 (N.D. W. Va. 1975), the district court denied a motion to vacate admissions and stated:

> In the instant case, permitting *Weva* to respond out of time would prejudice *Belco* by requiring it to prove matters contained in its requests for admissions as evidence in its Exhibit No. 13. From the record before the court, it can be ascertained that while the introduction of such evidence could in all probability be accomplished, the task would be lengthy, laborious, and extremely costly to *Belco*. In considering the weight of prejudice in such circumstances, the court must not treat lightly such burdens when visited upon a litigant, especially when that litigant has properly utilized the Rules of Civil Procedure to advance his litigation toward a "... [j]ust, speedy and inexpensive ..." (Rule 1, F.R.C.P.) conclusion. The express language of the Federal Rules of Civil Procedure as well as the spirit of the Rules support, it seems, *Belco's* position in this issue. Moreover, were the court to grant relief on the facts here presented, *i.e.*, an alleged procedural error, unsupported by affidavit, deposition or otherwise, in the office of the non-responding party's attorney, the result would be to totally nullify the time requirements set forth in Rule 36(a). . . .

68 F.R.D. at 666-667.[1]

When such governing legal principles are coupled with the

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1. Among the numerous other decisions by both courts of appeals and district courts supporting the decisions below here, *see also*: *U.S. v. Kasuboski*, 834 F.2d 1345, 1349-1350 (7th Cir. 1987); *999 v. C.I.T. Corp.*, 776 F.2d 866, 869-870 (9th Cir. 1985); *Dukes v. South Carolina Ins. Co.*, 770 F.2d 545, 548-549 (5th Cir. 1985); *In re Narowetz Mechanical Contractors, Inc.*, 99 Bankr. 850, 861 (N.D. Ill, E.D. 1989); *Gardner v. Borden, Inc.*, 110 F.R.D. 696, 697 (D. W.V. 1986); *In re Hartwig Poultry, Inc.*, 54 Bankr. 37, 39 (Bankr. N.D. Ohio 1985); *In re Bell & Beckwith*, 50 Bankr. 419, 421 (Bankr. N.D. Ohio 1985); *Kleckner v. Glover Trucking Corp.*, 103 F.R.D. 553, 557 (M.D. Pa. 1984); *EEOC v. Baby Products Co., Inc.*, 89 F.R.D. 129, 131 (E.D. Mich. 1981).

entire record in the instant action, the complete absence of any need for further review by this Court becomes, if possible, even more clear. Only several points will be reiterated here.

The record is replete with examples of non-cooperation and untimely responses by plaintiffs. These delays perpetuated this case indefinitely, resulting in considerable prejudice to defendant General Motors, as well as expenditures of the courts' and the parties' resources and energies in litigating this case.

From the time General Motors served its discovery and requests for admission, plaintiffs delayed, avoided, and ignored the requests for admissions until they finally took issue with them approximately 19 months after they were served. In so doing, plaintiffs utterly failed to take any responsive action. In fact, even after summary judgment in favor of defendant General Motors was entered on November 4, 1991, approximately seven additional months passed before plaintiffs acted. Even then, it was because of defendant Schmidt's then pending motion for summary judgment that plaintiff even bothered to file their Rule 36 motion. Even with plaintiffs' belated and defective motion, plaintiffs presented no satisfactory reason in attempted justification either of their continuing dilatory conduct or of their continuing efforts to inflict prejudice on defendant General Motors, including the continuing costs and expenses associated with this litigation.

Based on these circumstances, the district court stated in its August 4, 1992, order:

> Plaintiffs place great emphasis on the assertion that defendants have the burden of demonstrating prejudice by virtue of lost evidence. GM disputes this statement arguing that the loss of evidence may be a factor in establishing prejudice to its case. This Court agrees. The party opposing the withdrawal must demonstrate that it will be prejudiced in maintaining a defense. *See 999 v. C.I.T. Corp.*, 776 F.2d. 866 (9th

> Cir. 1985). In this case, GM relied upon the journalized admissions when it submitted its motion for summary judgment on June 12, 1991. In fact, the docket sheet indicates that any discovery on the part of GM ceased after the filing of Officer Thomas G. Medon's deposition. See, Docket Nos. 25 and 26. Certainly, after GM prevailed on the motion for summary judgment and was dismissed from the case, it would not be expected to continue to prepare its case. At this point, seven months after the admissions were deemed admitted, GM relied upon the effect of the admissions and assumed that its role in the case was concluded. For plaintiffs to submit their motion to withdraw admissions seven months after the journalized admissions were deemed admitted would no doubt prejudice defendant's case. . . .

Appendix, at 41-43, August 4, 1992, Memorandum and Order. The district court recognized that there was prejudice to General Motors inherent in the following: plaintiffs' dilatory conduct; this defendant's reliance on plaintiffs' journalized admissions in obtaining summary judgment; plaintiffs' long delay in filing the motion to withdraw these journalized admissions months after this defendant's role had been concluded in this action; and this defendant's continuing expenditures of considerable time and costs. Accordingly, the district court, in exercising its discretion, properly denied plaintiffs' motion to withdraw the journalized admissions.

On October 14, 1992, the district court reaffirmed its rulings when it denied plaintiffs' motion to reconsider, stating:

> In the case *sub judice,* plaintiffs present no justifiable reason for consideration of the previous decision. Instead, plaintiffs' argue that defendant's motion to journalize the admissions came as a surprise as GM failed to utilize Local Rule 3.04 to convey the

> seriousness of the admissions. Counsel for plaintiffs indicates that had this procedure been implemented, "the matters would have been worked out". However, counsel for plaintiffs should be aware that requests for admissions and response time thereto is clearly addressed within the Federal Rules of Civil Procedure and does not require more of opposing counsel before seeking journalization of admissions. Plaintiffs' motion for reconsideration is not well taken. . . .

Appendix, at 17-18, August 4, 1992, Memorandum and Order.

In view of all of the foregoing, it is clear beyond cavil that the district court's judgment was correctly and properly affirmed by the court of appeals. As a matter of law, defendant General Motors was entitled to judgment. For these reasons alone, and there are more, there is no need, either real or imagined, for further review by this Court.

III. AFTER BOTH THE DISTRICT COURT AND THE COURT OF APPEALS HAVE FULLY EXAMINED AND CONSIDERED PLAINTIFFS' ASSERTED CLAIM AGAINST A DEFENDANT AND HAVE RENDERED CORRECT DECISIONS ADVERSE TO PLAINTIFFS, THIS COURT SHOULD NOT BE PERSUADED EITHER BY UNSUPPORTED AND UNSUPPORTABLE ARGUMENTS OR BY MEANINGLESS ARGUMENTS TO PERMIT FURTHER REVIEW AND THEREBY UNNECESSARILY TO BURDEN FURTHER ITS DOCKET.

Since the basic reasons and authorities why defendant General Motors was entitled to judgment in the district court have previously been set forth either by that court or by the Sixth Circuit, or by both of them, and also in this brief and remain unimpaired by the petition, those matters need not again be reiterated. Instead, this section of this brief will be confined to responding to the petition and only to those points which might

possibly suggest any desirability of any response at all. So structured, this section of this brief will also not attempt to treat each and every irrelevancy, transparency, and the like in the petition, which, in the absence of a requirement to do so, would only unduly and needlessly burden the Court.

Plaintiffs have advanced essentially the same arguments which were rejected either by the district court or by the Sixth Circuit, or by both of them. In the petition, such arguments are styled under four headings. Each of these four arguments is meritless as to defendant General Motors, and each will be noted briefly below.

First, plaintiffs argue what they perceive to be the merits of their case by attempting to attack the district court's decision in journalizing defendant General Motors' requests for admissions. Petition, at 24. Only a few comments, if indeed any, are appropriate with respect to such argument here.

In making this first argument, plaintiffs basically set forth the same arguments that they made to, and were rejected by, the district court and the Sixth Circuit. Indeed, the plaintiffs even quote extensively from one of their prior briefs to the Sixth Circuit. Petition, at 26, 27, 28, 29.

In making this first argument, plaintiffs also basically overlook (and conveniently so), among so much else, that the so-called affidavits on which they now claim to rely as to the perceived merits of their case were filed long after defendant General Motors had served its requests for admissions on plaintiffs and even after the district court had journalized the deemed admissions and that plaintiffs did absolutely nothing as to those requests during that entire lengthy period. Indeed, it was not until June 17, 1992, approximately 12 months after defendant General Motors had filed its motion for summary judgment and approximately seven months after the district court had entered summary in favor of defendant General Motors, that plaintiffs filed

a Rule 36(b) motion to withdraw those admissions and to vacate that summary judgment. Even if the facts were otherwise (and they are not), it is far too late for plaintiffs to be arguing what they perceive to be the merits of their case as to the involved 1986 accident.

In making this first argument, plaintiffs also basically overlook (and again conveniently so) the status of the instant action. Both the district court and the Sixth Circuit have held that defendant General Motors was entitled to summary judgment. As a result, plaintiffs' argument as to the perceived merits of their case, even if they were otherwise valid (and they are not), only very belatedly raises inappropriate issues now. The district court correctly and properly granted summary judgment in favor of defendant General Motors on November 4, 1991. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986). The Sixth Circuit correctly and properly affirmed that judgment on May 26, 1994. Plaintiffs' first argument should be rejected.

Second, plaintiffs argue that "there is need for *proper* direction from this Court" with respect to Rule 36. Petition, at 41 (emphasis in original). In making this argument, however, plaintiffs admit, as they must, that they are, at least, "chargeable with delay." Petition, at 33.

In attempted support of this second argument, plaintiffs basically ignore the record in the instant action and then cite four decisions. The underlying faulty premises of this argument by plaintiffs have been previously exposed in this brief and elsewhere. In addition, and as demonstrated below, none of these four decisions even begins to lend support to plaintiffs' position here.

The first of these four decisions cited by plaintiffs is *Gutting v. Falstaff Brewing Corp.*, 710 F.2d 1309 (8th Cir. 1983). Petition, at

34. Plaintiffs' discussion of that decision is, to say the least, inadequate. There, the defendant served requests for admissions on plaintiff; plaintiff's attorneys changed three times because of conflicts of interests; in the meantime, the response date for filing answers to the requests for admissions passed; on the same day that plaintiff's third attorney sought leave to file answers to the defendant's requests for admissions, the defendant also filed a motion for summary judgment. Without more, the facts there are decisively different from the facts here. Equally important, the Eighth Circuit made clear that the standard for permitting untimely responses under Rule 36 was one of discretion and stated:

> Because the district court has the power to allow a longer time, courts and commentators view this to mean that the court, in its discretion, may permit the filing of an answer that would otherwise be untimely. . . . Similarly, the granting of a motion to file the answers out of time is limited by the court's discretion.

710 F.2d at 1312-1313. There, the district court abused its discretion, and the court of appeals so held; here, the district court did not abuse its discretion, and the court of appeals so held.

The second of these four decisions cited by plaintiffs is *Smith v. First Nat. Bank of Atlanta*, 837 F.2d 1575 (11th Cir.,), *cert. denied*, 488 U.S. 221 (1988). Unfortunately, the facts upon which this decision was based are set forth in an unpublished opinion. Even so, the facts that are revealed in this decision are vastly different from those involved here. Primarily, of course, and unlike here, "the district court noted that the defendant's failure to timely respond to Smith's request for admission was inadvertent and `at most excusable neglect.' There is nothing in the record that shows such finding was clearly erroneous." 837 F.2d at 1577. In addition, and again unlike here, the defendant responded before judgment was entered. Even without additional facts, it is clear that the facts involved there were vastly different from those involved here.

That the Eleventh Circuit's views in the above-noted decision do not support plaintiffs' position here is further demonstrated by subsequent decisions of the Eleventh Circuit. For example, in the more recent decision of *U.S. v. 2204 Barbara Lane*, 960 F.2d 126 (11th Cir. 1992), the district court granted summary judgment in favor of the plaintiff based on pleadings and unanswered requests for admissions, and the Eleventh Circuit affirmed. After reviewing some of the recent decisions in which summary judgment based on journalized admissions had been upheld, the Eleventh Circuit then stated in language fully applicable here:

> Roberts [the defendant] was free to timely answer or object to the request and proceed through discovery to trial, but his silence conclusively established the government's case.

960 F.2d at 130. Like defendant there, the plaintiffs here neither answered nor objected, and their "silence conclusively established" defendant General Motors' case.

The third of these four decisions cited by plaintiffs is *Farr Man & Co., Inc. v. M/V Rozita*, 903 F.2d 871 (1st Cir. 1990). On facts not remotely comparable to the facts involved here, the district court held that there was "no unfairness in relieving the defendant of admissions *which are conceded to have been incorrect.*" 903 F.2d at 876 (emphasis added). In view of this concession, the First Circuit, after noting that the higher standard of manifest injustice was applicable because the trial had begun, held that the higher standard had been met "because, as the district court noted, the most current stipulation of facts sets the damages suffered by plaintiffs at $29,268.63, rather than the amount admitted to of $285,268.63 . . . [and] allowing that admission [of $285,268.63] to stand would have been manifestly unjust" and then held that the district court had appropriately permitted the defendant to withdraw its admissions. 903 F.2d at 876, 877. Clearly, the facts involved there are in no manner even comparable

to the facts involved here, and the First Circuit's discussion of Rule 36 fails to support plaintiffs' position here, but rather it further supports defendant General Motors' position here. Here, too, the district court, with "considerable discretion," correctly and properly denied plaintiffs' very belated post-judgment attempts to withdraw their admissions, and the Sixth Circuit, reviewing "only for abuse of discretion" as to those admissions, correctly and properly affirmed the district court's decision of summary judgment in favor of defendant General Motors. 903 F.2d at 876.

The fourth of these four decisions cited (but without an actual citation as such) by plaintiffs is *St. Regis Paper Co. v. Upgrade Corp.*, 86 F.R.D. 355 (W.D. Mich. 1980). The facts involved there have no resemblance whatsoever to the facts involved here. 86 F.R.D. at 357. Under the unusual circumstances involved there, the district court held that the issue as to whether or not to permit late responses was one of discretion and that, in the exercise of its discretion, late responses would be permitted. Moreover, the district court's basic holding further supports defendant General Motors' position here. In addition, the plaintiffs' assertion here that such decision stands for the proposition that "withdrawal of admissions was allowed almost 4 years later" is, at best, simply just another misleading assertion by plaintiffs. Petition, at 41. The district court, after noting that a stipulation for time had been entered by the parties and that a motion to quash the requests for admissions had been filed by defendants early in the lawsuit, specifically held that "the period of unexcused lateness, therefore, is merely from March 31, 1976 to May 14, 1976, a period of forty-four (44) days." 86 F.R.D. at 356.

Thus, none of the four decisions cited by plaintiffs even begins to lend support to plaintiffs' position here. Indeed, each of such four decisions supports in one way or another, or more, defendant General Motors' position here.

In attempted support of this second argument, plaintiffs also attempt to assert that there is "confusion" with respect to Rule 36

among the various decisions of the district courts and the courts of appeals. Petition, at 41. There is simply no such "confusion" with respect to Rule 36 as asserted by plaintiffs. As one standard text, in summarizing the decisions under Rule 36 and also the governing principles applicable here, states in straight-forward language:

> The 1970 amendments made it *plain* that any matter admitted under Rule 36 is conclusively established unless the court permits withdrawal or amendment of the admission. Summary judgment can then be granted, in whole or in part, on the basis of facts actually admitted, or on facts deemed admitted . . . .

4A *Moore's Federal Practice*, ¶36.08 (2d ed. 1994), at 36-75 and 36-76 (footnotes omitted; emphasis added). The only real demonstration of "confusion" comes from the petition itself. Most tellingly, but among other choices, plaintiffs even fail to recognize the differences between Rule 36 and Rule 37.

> Mere delay in answering Interrogatories does not result in dismissal; only failure to respond to a Court Order to answer Interrogatories.

Petition, at 41. Finally, even if there were "confusion" with respect to Rule 36 among the various decisions of the district court and the courts of appeals (and plaintiffs have completely and totally failed to so demonstrate), plaintiffs, as the record in the instant action demonstrates beyond cavil, are in no position to seek "*proper* direction from this Court." Petition, at 41 (emphasis in original).

Additional comments as to plaintiffs' second argument would appear to be singularly inappropriate. Here, plaintiffs are admittedly "chargeable with delay." Petition, at 33. Even more significantly, it was not until June 17, 1992, approximately twelve months after defendant General Motors had filed its motion for summary judgment and approximately seven months after the district court had entered summary judgment in favor of defendant

General Motors, that plaintiffs even bothered to attempt to withdraw the previously-journalized admissions and to vacate the summary judgment in favor of defendant General Motors. Plaintiffs' second argument should be rejected.

Third, plaintiffs argue that "this Court . . . [should] direct a return to basic American Values." Petition, at 44. In attempted support of this third argument, the plaintiffs initially cite one of their own prior briefs to the Sixth Circuit. Petition, at 43. The referenced matters in that brief are clearly not pertinent here, and, by affirming the district court's decision, the Sixth Circuit has also agreed that such referenced matters are not pertinent here. The plaintiffs then cite, but without meaningful discussion, and also apparently without understanding, two decisions by this Court: *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), and *National Hockey League v. Met. Hockey Club*, 427 U.S. 639 (1976). Petition, at 44. The facts in each of these two decisions are so completely and totally different from the facts involved here that comparisons are impossible; in addition, each of these two decisions was based on Rule 37, not Rule 36. 357 U.S. at 207, 211; 427 U.S. at 639, 642-643. Without more, neither of these two decision provides any support whatsoever as to plaintiffs' position here.

This third argument then concludes with the plea: "We ask this Court to direct a return to basic American Values." Petition, at 44. If a plea of this type for direction by plaintiffs were even appropriate here, certainly any resultant direction would include a direction to plaintiffs to follow the basic American rules of civil litigation, including the Federal Rules of Civil Procedure. Any additional comments by defendant General Motors as to this third argument would be both inappropriate and unwarranted.

Fourth, plaintiffs argue that a "trial court" should be required, "before entering an order of dismissal," to "point out" any "found deficiencies in" affidavits. Petition, at 45. By its own terms, this argument is directed to "Mr. Setola's Affidavit of January 7, 1992,

App. 58." Petition, at 45. As shown, said affidavit, which consists of 28 pages, was filed on January 7, 1992. Since the district court had previously granted defendant General Motors' motion for summary judgment on November 4, 1991, only a few comments, if indeed any, by defendant General Motors are appropriate with respect to such argument here.

In attempted support of this fourth argument, the plaintiffs quote at length, approximately three single-spaced pages, from one of their own prior briefs to the Sixth Circuit. Petition, at 45A, 46, 47, and 48, in part. Here, the district court (and long after it had granted defendant General Motors' motion for summary judgment) correctly and properly determined that defendant Schmidt's motion to strike Mr. Setola's affidavit was "well taken." Appendix, at 21-22, October 14, 1992, Memorandum and Order. Obviously, the Sixth Circuit, after "having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties" and then affirming, also correctly and properly rejected the underlying premises of this argument. Appendix, at 1-2.

To this Court, the plaintiffs present nothing new, but rather they merely quote at length from a prior brief to the Sixth Circuit. Without more, plaintiffs' fourth argument should be rejected. In addition, plaintiffs' suggestions, if adopted, would impose additional burdens on an ever-increasingly busy judiciary. And, of course, plaintiffs' suggestions, if adopted, would be unjust as to all other parties, would cause additional delays, and would cause increased expenses. Such results would all be in direct conflict with the stated purposes of the Federal Rules of Civil Procedure.

> They [these rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Fed. R. Civ. P. 1. For these reasons alone, and there are others, plaintiffs' fourth argument should also be quickly rejected.

When, as here, both the district court and the court of appeals have fully examined and considered plaintiffs' asserted claim against defendant General Motors and have rendered correct decisions adverse to plaintiffs, this Court should not be persuaded either by unsupported and unsupportable arguments or by meaningless argument to permit further review. Under these circumstances, further review is neither warranted nor appropriate, and it should be declined.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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October 11, 1994

OPPOSITION APPENDIX A: MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED APRIL 10, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:90CV7317

FRANK SETOLA, et al.,

Plaintiff(s),

-vs-

BOB SCHMIDT CHEVROLET, INC., et al.,

Defendant(s).

MEMORANDUM AND ORDER

WALINSKI, J.

This matter is before the Court on defendants' motion to compel and motion to journalize admissions. Also before the Court is plaintiffs' motion for extension of time to respond to defendants' motion to journalize admissions. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

Defendants seek to compel answers to their first set of interrogatories and requests for production of documents which were mailed to plaintiffs at the beginning of November 1990. Plaintiffs have allegedly failed to submit answers despite repeated

requests by defendants' counsel. In support of their contentions, defendants submit letters to plaintiffs' counsel which attempted to resolve the delay. The Court finds that defendants have complied with Local Rule 3.04.

However, on March 20, plaintiffs submitted and were granted an extension of time until April 11, 1991 to answer the interrogatories. The Court is not aware that plaintiffs have failed to comply with that deadline and therefore assumes the answers were filed. Defendants' motion is therefore denied. However, defendants may refile their motion if in fact plaintiffs have failed to comply with the April 11 deadline.

Also before the Court is defendants' motion to journalize the admissions served upon plaintiffs on November 13, 1990. Under Rule 36:

> A party may serve upon any other party a written request for the admission, for the purposes of a pending action only, the truth of any matters within the scope of Rule 26(b) . . .
>
> The matter is *admitted* unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney . . .

Fed. R. Civ. P. 36(a). Failure to respond to a request for admissions serves to deem them admitted. *Smith v. First National Bank of Atlanta,* 837 F.2d 1575 (11th Cir. 1988).

Opposition Appendix A

In the case *sub judice,* defendants submit that plaintiffs have failed to respond to the requests served upon them. Plaintiffs seek an extension of time until April 17, 1991 to respond to defendants' motion. Plaintiffs had until December 17, 1990 to respond to the requests or in the alternative seek an extension of time as to the requests. Plaintiffs did neither. As they failed to respond in a timely fashion the Court finds defendants' motion well taken and the requests are deemed admitted.

Accordingly, plaintiffs (sic) motion for an extension of time is denied. It is therefore,

ORDERED that defendants' motion to compel is denied.

FURTHER ORDERED that defendants' motion to journalize admissions is granted. Request for admissions No. 1 through 4 of defendants' exhibit A are deemed admitted.

FURTHER ORDERED that plaintiffs (sic) motion for an extension of time is denied.

s/ Nicholas J. Walinski
NICHOLAS J. WALINSKI
SENIOR U.S. DISTRICT JUDGE

TOLEDO, OHIO
April 10, 1991

OPPOSITION APPENDIX B: MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED NOVEMBER 4, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:90CV7317

FRANK SETOLA, et al.,

Plaintiff(s),

-vs-

BOB SCHMIDT CHEVROLET, INC., et al.,

Defendant(s).

MEMORANDUM AND ORDER

WALINSKI, J.

This matter is before the Court on defendants' motion for summary judgment and a motion to strike certain affidavits. Plaintiffs submit their opposition thereto. Jurisdiction is based upon 28 U.S.C. § 1332. The Court finds defendants' motions well taken and grants the same.

This is a personal injury case which originally was filed in state court and voluntarily dismissed. As plaintiffs moved out of state, they refiled the action in this Court claiming diversity jurisdiction.

Opposition Appendix B

Plaintiff Frank Setola and his wife Cheryl ("Setola") bring this action against both Bob Schmidt Chevrolet ("Bob Schmidt") and General Motors Corporation ("General Motors"). On December 3, 1985 Setola purchased a new 1985 Chevrolet Corvette from defendant Bob Schmidt. On January 30, 1986 Setola and the car were involved in an accident with another vehicle which resulted in Setola being issued a citation for failure to maintain assured clear distance. Between the date the car was purchased and the accident, plaintiffs took the car for service and repairs at Bob Schmidt.

Plaintiffs allege defective design, defective manufacture, breach of warranty, breach of contract, failure to warn and negligence. General Motors moves for summary judgment and to strike affidavits submitted by plaintiffs.

Rule 56, Fed. R. Civ. P., directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Court's function in ruling on a motion for summary judgment is to determine if any genuine issue exists for trial, not to resolve any factual issues, and to deny summary judgment if material facts are in dispute. *United States v. Articles of Device*, 527 F.2d 1008, 1011 (6th Cir. 1976); *Tee-Pak, Inc. v. St. Regis Paper Co.*, 491 F.2d 1193, 1195 (6th Cir. 1974). Further, "[i]n

ruling on a motion for summary judgment, the evidence must be viewed in a light most favorable to the party opposing the motion." *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1324 (6th Cir. 1983). To summarize, summary judgment is only appropriate when no genuine issue of material fact remains to be decided, and when the undisputed facts, viewed in a light most favorable to the non-moving party, entitle the movant to judgment as a matter of law. *Smith v. Pan Am World Airways,* 706 F.2d 771, 773 (6th Cir. 1983).

A principle purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). Rule 56(e) places responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P. Rule 56(e) requires the non-moving party to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, or admissions on file, designate specific facts showing a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. at 324.

Opposition Appendix B

The law of Ohio is well settled on the elements to be proven in a products liability case. It must be demonstrated by a preponderance of the evidence that:

> (1) there was, in fact, a defect in the product manufactured and sold by the defendant; (2) such defect existed at the time the product left the hands of defendants; and (3) the defect was the direct and proximate cause of the plaintiff's injuries or loss.

Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966). *See State Auto Mut (sic)Ins. Co. v. Chrysler Corp.*, 36 Ohio St. 2d 151, 304 N.E.2d 891 (1973); *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977); *Friedman v. General Motors Corp.*, 43 Ohio St. 2d 209, 331 N.E.2d 702 (1975); *Bowling v. Heil Co.*, 31 Ohio St. 3d 277, 511 N.E.2d 373 (1987); *State Farm Fire & Casualty Co. v. Chrysler Corp.*, 37 Ohio St. 3d 1, (sic) (1988).

Previously this Court granted defendants' motion to journalize and deem admitted the following:

> *Request for Admission No. 1:* Please admit that there was and is no contract between plaintiffs and General Motors Corporation in respect of this 1985 Corvette.
>
> *Request for Admission No. 2:* Please admit that this 1985 Chevrolet Corvette was not defectively designed by defendant G.M.
>
> *Request for Admission No. 3:* Please admit

> that this 1985 Chevrolet Corvette was not defectively manufactured by defendant G.M.
>
> *Request for Admission No. 4:* Please admit that plaintiff Frank Setola's failure to maintain assured clear distance ahead caused the accident averred in plaintiffs' complaint.

See, Order dated April 10, 1991. It is on the basis of these admissions that General Motors seeks summary judgment of the claims asserted by plaintiffs.

Plaintiffs assert that these admissions do not preclude their right to recover under theories of strict liability and breach of warranty. Plaintiffs are correct in their recitation of the law as it pertains to strict liability in tort. *See, Lonzrick, supra.*

However, through the journalized admissions, there is no genuine issue of material fact left as to the alleged defect. Plaintiffs have clearly admitted that no defect existed when the automobile left General Motors' hands. Moreover, plaintiffs admit that the cause of the January 1986 collision was caused by Frank Setola. Plaintiffs take issue with that admission claiming that Setola's actions were not the *sole* cause of the accident. While plaintiffs choose at this late date to argue about semantics, this Court will not entertain such claims as those should have been dealt with at the time the admissions were served upon plaintiffs.

As to the claim for breach of warranty, plaintiffs allege that the question of proximate cause is a question for the jury. Ordinarily this is true where the facts are in dispute, but again plaintiffs have admitted through Admission No. 4 that the accident was caused by Setola. It thus appears that there exists no genuine issue of material

fact left for a jury as to the state of the car when it left General Motors or the proximate cause of the accident.

Plaintiffs attempt to overcome the admissions through a series of affidavits which defendants have moved to have stricken for noncompliance with the Fed. R. Civ. P. 56(e). The Court notes that the admissions were served upon plaintiffs on November 13, 1990. It was not until April 5, 1991, almost five months later, that plaintiffs moved for an extension of time to respond to the admissions. Thereafter, on April 10, 1991, the Court granted defendants' motion to admit the admissions.

The effect of Rule 36 is clear:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawl (sic) or amendment of the admission . . .

Fed. R. Civ. P. 36(e) (sic). Once such matters are admitted, summary judgment can be granted on the basis of the admissions. 4A J. Moore & J. Lucas, Moore's Federal Practice ¶ 36.08 (2d ed. 1991). *See, United States v. Kasuboski,* 834 F.2d 1345 (7th Cir. 1987); *Donovan v. Carls Drug Co.,* 703 F.2d 650 (2d Cir. 1983); *United States v. Kenealy,* 646 F.2d 699 (1st Cir.,), *cert. denied,* 454 U.S. 941 (1981). Default admissions cannot later be attacked on the basis of affidavits contained within an opposition to summary judgment. *O'Bryant v. Allstate Ins. Co.,* 107 F.R.D. 45 (D. Conn. 1985).

While the effect of the above admissions is clear, to allow plaintiffs at this juncture to attack the issues contained in the admissions is to disregard the letter of the law and reward plaintiffs

for their inaction. Accordingly, the Court finds that the admissions are properly applied to the motion for summary judgment. There exists no genuine issue of material fact and as a matter of law, General Motors is entitled to summary judgment on all claims.

Based upon the above determination, the Court finds that defendants' motion to strike the affidavits is denied as moot.

Therefore, it is

ORDERED that defendants' motion for summary judgment is granted.

FURTHER ORDERED that defendants' motion to strike is denied as moot.

FURTHER ORDERED that General Motors is dismissed from this action.

s/ Nicholas J. Walinski
NICHOLAS J. WALINSKI
SENIOR U.S. DISTRICT JUDGE

TOLEDO, OHIO
November 4, 1991

OPPOSITION

BRIEF

No. 94-440

Supreme Court, U.S.
FILED
NOV 9 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

FRANK SETOLA, *et al.*,

Petitioners,

vs.

BOB SCHMIDT CHEVROLET, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT BOB SCHMIDT CHEVROLET, INC.

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QUESTIONS PRESENTED

As this Petition applies to Respondent Bob Schmidt Chevrolet, Inc., the following questions are presented:

1. Whether the summary judgment granted by the district court in favor of Respondent Bob Schmidt Chevrolet, Inc., and affirmed by the court of appeals, was incorrect as a matter of law.

2. Whether the district court committed prejudicial error by striking certain affidavits submitted by Petitioners, and whether said decision was incorrectly affirmed by the court of appeals.

3. Whether the conduct of Petitioners in repeatedly ignoring the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence, warrants the granting of a petition for review by this Court.

PARTIES TO THE PROCEEDING

Respondent Bob Schmidt Chevrolet, Inc. adopts and incorporates by reference the statement as to the parties of the Respondent General Motors Corporation contained in its Brief in Opposition filed on October 11, 1994.

Respondent Bob Schmidt Chevrolet, Inc. will use the nomenclature adopted by co-Respondent General Motors when referring to the parties to this action.

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STATEMENT OF THE CASE

A. Introduction and Proceedings Below

Respondent Bob Schmidt Chevrolet, Inc. (hereinafter "Respondent Bob Schmidt" or "Bob Schmidt") sets forth this brief Statement of the Case. This Statement will include the nature of the case, the course of the proceedings in the lower court, and the disposition of the case. Due to the protracted nature of the litigation and, in the interest of judicial economy, many of the extraneous details will necessarily be eliminated from this Statement. The docket relative to this case, which includes well over one hundred entries, is evidence of the quantity of filings submitted to the district court. In their Statement, Petitioners included many extraneous facts and allegations purporting to be facts which tend to obfuscate the issues herein. This Respondent will restrict its consideration to those facts supported by admissible evidence and germane to the issues before this Court.

This is a personal injury case wherein the Petitioner Frank Setola claims injuries, allegedly as a consequence of a motor vehicle collision that occurred on January 30, 1986. Mr. Setola claims the collision and his alleged injuries resulted from the negligence of Respondents and a defective product, specifically the brakes of the vehicle, manufactured by Respondents General Motors Corporation and Hydramatic Division of General Motors, and sold to Mr. Setola by this Respondent. Petitioner Cheryl Setola raises claims of loss of consortium and loss of services. (Petitioners hereinafter are referred to as such, or as "Mr. Setola" and "Mrs. Setola").

Petitioners originally filed their action against the Respondents, Bob Schmidt Chevrolet, Inc., General Motors Corporation and its Hydramatic Division (hereinafter "General Motors") in the Court of Common Pleas, Lucas County, Ohio on January 29, 1988. During the pendency of the action in state

court, some discovery was undertaken. Petitioners also sought jurisdiction in the federal district court, but the case was remanded due to lack of diversity jurisdiction. On June 22, 1989, the Petitioners voluntarily dismissed their action pursuant to Rule 41(A) of the Ohio Rules of Civil Procedure with the right to re-file within one year. The Petitioners filed their Notice of Dismissal while General Motors' Motion to Dismiss for Want of Prosecution was pending.

The instant action was re-filed in the United States District Court on June 22, 1990, the last possible date on which Petitioners could re-file their lawsuit. Petitioners based the federal court's jurisdiction on diversity, due to their relocation to the State of New Jersey. Petitioners, in this Complaint, alleged that Petitioner Mr. Setola purchased a new 1985 Chevrolet Corvette ("Corvette") from Bob Schmidt on or about December 9, 1985 (the date of purchase was actually December 3, 1985) and that shortly after its purchase, the Corvette experienced braking problems and was taken to Bob Schmidt for repair. (Complaint, paragraph 2). Petitioners further alleged that on or about January 29, 1986, Mr. Setola was injured in the collision as a result of the failure of the Corvette's brakes. (Complaint, paragraph 3).

Petitioners' allegations against Respondents sound in negligence and product liability. The product liability claims are those of defective design, defective manufacture, breach of warranty, breach of contract, breach of representation and failure to warn. Petitioners' allegations of negligence apparently pertained to the alleged failure of Bob Schmidt to repair the Corvette's braking system.

Answers were filed by both Respondents and discovery requests were propounded upon the Petitioners. Bob Schmidt propounded discovery requests in the form of interrogatories and requests for production of documents directed to Petitioners. General Motors propounded a set of interrogatories, requests for

production of documents and requests for admissions upon the Petitioners.

On October 12, 1990, the district court issued an order outlining a litigation management schedule. The order established that a jury trial was to begin on September 9, 1991. The order also established a motion filing deadline of July 9, 1991; discovery was to be completed by June 9, 1991; and, the respondents were granted leave to move for summary judgment.

Petitioners failed to respond to the Respondents' discovery requests. On March 5, 1991, Bob Schmidt filed a motion to compel. On March 18, 1991, General Motors filed a motion for an order journalizing admissions, which order was entered on April 10, 1991.

Subsequent to obtaining the order journalizing admissions, General Motors moved for summary judgment. The motion for summary judgment by General Motors created a flurry of activity by Petitioners. In an effort to preclude an adverse summary judgment decision by the district court, Petitioners filed numerous affidavits and motions, including a motion by Petitioners to vacate the September 9, 1991 trial date.

On November 4, 1991, the district court issued its memorandum and order granting General Motor's motion for summary judgment. Bob Schmidt moved for summary judgment on December 6, 1991. Again, Petitioners filed numerous motions and affidavits, including motions to file supplemental responses and motions to file additional affidavits. Among the motions filed by Petitioners was a motion for withdrawal or amendment of the journalized admissions, which motion was filed on June 17, 1992.

On October 14, 1992, the district court granted Bob

Schmidt's motion for summary judgment and motion to strike the affidavits of Mr. Setola and Mr. Karoly, *inter alia*. This case was terminated by judgment entry on October 16, 1992.

Petitioners continued to seek relief from the district court by filing additional affidavits, a notice of appeal and a motion for reconsideration. The district court issued an order on January 26, 1993, denying Petitioners' motion to alter or amend its prior judgment and denying their motion for reconsideration.

On February 24, 1993, Petitioners filed a notice of appeal to the Sixth Circuit Court of Appeals. All parties filed extensive briefs and oral arguments were heard by the Court on May 10, 1994. On May 16, 1994, the Court issued a *per curiam* decision affirming the decisions of the district court in favor of both Respondents.

B. The Accident and Ancillary Matters

Respondent Bob Schmidt sets forth a brief statement of the accident and other facts that are relevant to the issues raised in Petitioners' Brief and which facts are perceived as applicable to the claims alleged by Petitioners against Bob Schmidt. Each fact is supported by a reference to an entry in the Record.

On January 30, 1986, Petitioner Frank Setola was involved in a motor vehicular collision near the intersection of Anthony Wayne Trail and City Park Drive, in Toledo, Ohio. (Record Entry No. 1). In this collision, Mr. Setola, while operating his Corvette, hit the back of another vehicle that was the second of two vehicles stopped for a red traffic light at the intersection. (Record Entry No. 56, Affidavit attached thereto).

This collision was witnessed by Nancy McCray, the operator of the first of the two vehicles stopped at the intersection waiting

for the light to change. Mrs. McCray testified by affidavit that she observed the Corvette approaching the intersection in the rear view mirror of her vehicle. She stated that the vehicle, which she later discovered to be operated by Mr. Setola, was approaching at such a high rate of speed, she knew that it would be unable to stop and that it would collide with the rear of the vehicle behind hers. (Record Entry No. 56, Affidavit attached thereto).

The accident was investigated at the scene by officers of the Toledo Police Department. One of the investigating officers, Thomas G. Medon, testified in his deposition that Mr. Setola told him that there was some malfunction of the braking system before the accident. (Deposition of Officer Medon, p. 11, Record Entry No. 26). However, Mr. Setola was not able to demonstrate to Officer Medon that any malfunction of the vehicle was at fault in the accident. (Deposition of Officer Medon, pp. 16, 19, 21). Mr. Setola was permitted to retain custody of the Corvette after proving to the investigating officers that the brakes were working. (Deposition of Officer Medon, pp. 12, 24). Officer Medon testified that he observed Mr. Setola move his vehicle and did not observe him having any difficulty stopping the vehicle. (Deposition of Officer Medon, p. 15). Officer Medon further testified that if Mr. Setola had demonstrated to the officers at the scene that the accident was the consequence of brake failure, he would have been issued a citation for mechanical failure of the vehicle and no such citation was issued. (Deposition of Officer Medon, pp. 16, 18, 19).

C. The Vehicle

The vehicle driven by Mr. Setola at the time of the accident was a 1985 Corvette that he had purchased new from Respondent Bob Schmidt on December 3, 1985. Bob Schmidt had previously purchased the Corvette from co-Respondent General Motors.

The service records relating to the Corvette were produced by Bob Schmidt. (Record Entry No. 56, Affidavit attached thereto). John Schaller, Service Manager of Bob Schmidt, testified by Affidavit that he is the custodian of the service records of Bob Schmidt and, as custodian of the service records, caused a search to be made of such records for all of the records pertaining to service or repairs on the Corvette. As a result of the search, five repair orders were located, certified copies of which were attached to the Affidavit of Mr. Schaller and incorporated therein. (Record Entry No. 56, Affidavit attached thereto).

A review of the repair orders reveals that two such orders related to service work performed on the Corvette before Mr. Setola's purchase of it. Three of the repair orders were completed after Mr. Setola's purchase of the Corvette. (Record Entry No. 56, Affidavit attached thereto).

A further review of the five repair orders reveals that the only mention relating to the braking system of the vehicle occurred on December 19, 1985, when Mr. Setola reported that the "rear brakes lock up." However, on December 19, 1985, and before any service was performed on the car, Mr. Setola stated that he could not wait for service and the repair order was marked "void." No work was performed on the Corvette on December 19, 1985. The mileage on the Corvette odometer on December 19, 1985, when the repair order was written, was 3,233. (Record Entry No. 56, Affidavit attached thereto).

Mr. Setola next presented the car to Bob Schmidt for service more than one month later on January 23, 1986. He made no complaint to Bob Schmidt personnel about braking problems on that date. The only notation on this repair order, dated and signed by Frank Setola on Jauary 23, 1986 that may possibly refer to braking function, is: "Ck for rear axle lk at LR wheel + wheel seems to lock up at times." The notation by Bob Schmidt service personnel is "no leaks at this time." The mileage noted on the

repair order dated January 23, 1986 was 7,194. Mr. Setola drove the Corvette another 3,961 miles in the one month period after he had reported to Bob Schmidt that the "rear brakes locked up" but that he did not have time to wait for service on his car. (Record Entry No. 56, Affidavit attached thereto).

Further, Mr. Schaller stated under oath that it is the ordinary and customary practice of Bob Schmidt for its personnel to test drive each vehicle before its delivery to a customer both at the time before its initial delivery from stock and at the time after service work is performed on the vehicle. One of the systems routinely tested by service personnel is the braking system of the vehicle. Mr. Schaller stated that a vehicle would not be released to the customer if the braking system was not functioning properly. (Record EntryNo. 56).

D. Subsequent Expert Investigation of the Accident

After the accident of January 30, 1986, evidence in the record reveals that Mr. Setola's liability carrier employed a professional engineer to investigate the cause of the accident. (Record Entry No. 34, Affidavit attached thereto). The professional engineer, Lawrence P. Wilson, issued a report, which report and an accompanying affidavit were initially submitted as evidence to the lower court by the Petitioners. Mr. Wilson stated in his affidavit that he "was hired to, and did make an investigation into the conditions of the Brake System and constituent parts, all for the Celina Insurance Company, and issued my report of investigation, Report No. 209586; and in the said report I made the statements and observations of facts, and what I did, and what was done at my direction, and all the same are true, to the best of my recollection and true also to my personal knowledge. . ." Mr. Wilson's affidavit indicates that he was present on February 18, 1986, when samples of the Corvette's brake fluid were taken from it. Mr. Wilson's report, dated October 30, 1986, also indicates that the samples were sent

to a laboratory for analysis and that the analysis showed that the brake fluid contained a contaminant, mineral oil. (Record Entry No. 34).

Mr. Wilson's Report also indicates that he was present on May 9, 1986 when parts of the braking system were removed from the Corvette. At that time certain fluid samples from the brake system were taken and these were "divided approximately 50-50 with Mr. Setola's investigator and all of the parts removed from the vehicle were taken by Mr. Setola's investigator for laboratory analysis." The report of Mr. Setola's investigator was apparently received by Mr. Wilson on October 1, 1986, as this report was referenced in Mr. Wilson's report, dated October 30, 1986. The report of Mr. Setola's investigator was also referenced in the letter to Mr. Setola's carrier dated October 30, 1986, which letter was included with the report and affidavit filed by Petitioners with the Court. In pertinent part, Mr. Wilson's letter reads:

> Our investigation of the above claim has been completed and our report is attached hereto. As you know, we were waiting for Mr. Setola's prior attorneys to complete their tests on the brake parts we witnessed removed. *That report was received this month and we see no need to proceed further with our tests.* (Emphasis added).

Mr. Wilson was present at the time the fluid samples were removed on February 18, 1986. He was present when the brake system parts were removed on May 9, 1986. He reviewed the laboratory data, conducted testing, and, after analysis and investigation, decided that the contamination was *not present throughout the braking system and expressly concluded that it could not be determined that the mineral oil contamination had*

any effect on the braking system of the Corvette. In that regard, Mr. Wilson concluded:

> In our opinion, the brake fluid contamination of mineral oil caused the distortion of the master cylinder caps. *It was impossible however, to prove that this had any effect on the braking actions of the vehicle* because no distortions were found in the brake line hoses nor the wheel cylinder caps. (Emphasis added).

(Record Entry No. 34).

The Petitioners' own liability carrier concluded that there was no evidence that the mineral oil contamination in the brake fluid caused the failure of the braking system.

The Petitioners have never offered a report of the results of the investigator hired by Mr. Setola, with whom Mr. Wilson stated that he shared the fluid samples. The only references in the record to an investigator employed by Mr. Setola are contained in the writings of Mr. Wilson. Based upon Mr. Wilson's writings, which include his report of his investigation, and his letter to Mr. Setola's liability carrier, it may be reasonably concluded that the investigator employed by Mr. Setola reached a similar conclusion. Mr. Wilson's aforementioned writings and his accompanying affidavit are properly in the record. (Record Entry No. 34).

No evidence to the contrary has been properly introduced by the Petitioners.

SUMMARY OF ARGUMENT

I. As to this Respondent, Petitioners asserted claims based upon negligence and products liability. Either theory requires a demonstration of proximate causation. Almost seven years elapsed from the date of the accident to the terminating of the litigation by order granting summary judgment. Petitioners, despite the opportunities presented by the significant time period, utterly failed to make a showing sufficient to establish the existence of evidence essential to the elements of their case. The district court and the appellate court properly recognized the utter paucity of evidence by Petitioners. There are no issues presented by Petitioners in their Petition to this Court which warrant review.

II. Upon motion of this Respondent, the district court struck certain affidavits submitted by Petitioners. One affidavit submitted was that of a purported expert. The other affidavit was that of Mr. Setola. Both were properly struck on the grounds that they failed to comply with the requirements of the rules governing admissibility.

III. The dilatory conduct by Petitioners, in and of itself, during the pendency of this litigation is sufficient reason for denial of their Petition.

REASONS FOR DENYING THE WRIT

Respondent Bob Schmidt Chevrolet, Inc. relies upon the reasons as stated previously by co-Respondent General Motors in its Brief in Opposition. Additionally, as to the issues which Petitioners attempt to raise warranting review by this Court as they may specifically apply to Schmidt, this Respondent states that the evidence and the facts have been thoroughly reviewed by the District Court and further reviewed by the Court of Appeals. The appellate court upheld the findings of the district court. Petitioners have failed to demonstrate that the lower courts

committed an obvious and exceptional error in their review of the evidence. The record is utterly devoid of any evidence which indicates any reason for this Court to review this case and to re-examine the factual determinations previously made by the lower court and upheld by the appellate court. *Mobil Oil Corp v. FPC*, 417 U.S. 283, 310 (1984); *United States v. Johnston*, 268 U.S. 220, 227 (1925).

For the foregoing reason, as well as the reasons stated by co-Respondent General Motors, the petition should be denied.

I.

THE DISTRICT COURT'S ENTRY OF AN ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF BOB SCHMIDT AND THE AFFIRMANCE BY THE COURT OF APPEALS WAS NOT CLEARLY ERRONEOUS.

Petitioners' claims against Bob Schmidt were terminated in the lower court by Opinion and Order granting Summary Judgment in favor of Bob Schmidt as to the allegations based upon negligence and products liability on October 14, 1992. The Sixth Circuit Court of Appeals affirmed the district court's decision on May 26, 1994. The standard of review for an appellate court in reviewing a Summary Judgment Order is that of "clearly erroneous."

This Court described the "clearly erroneous" standard of review in *United States of America v. United States Gypsum Co.*, 333 U.S. 364 (1947). The Court stated that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 395. The distinct court's findings are conclusive upon appeal unless

they are found to be clearly erroneous. *Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 792 (6th Cir. 1984).

Accordingly, the lower courts' determinations must be upheld by this Court unless they are shown to be clearly erroneous. To reverse, this Court must find that there is competent and credible evidence supporting each essential element of Petitioners' claims.

Petitioners' Complaint raised claims against Bob Schmidt grounded in negligence and products liability. Either theory of recovery requires a showing by Petitioners of proximate causation, which must be demonstrated by a preponderance of the evidence. Petitioners, during the almost seven years which elapsed from the date of the accident to the termination of litigation by the trial court on summary judgment, failed to demonstrate the requisite proximate causation nexus. The evidence in the record clearly shows that there is no genuine issue of material fact, even when the evidence is construed most strongly in favor of Petitioners.

A. Petitioners' Allegations Of Wrongdoing Pertaining To Bob Schmidt

Petitioners contend that certain conduct or omissions by Bob Schmidt caused Mr. Setola's alleged brake failure and claimed injuries. In summary, Petitioners contentions follow:

> (1) Mr. Setola claims that Bob Schmidt was negligent when its personnel allegedly "ordered" him to drive his car to the dealership after he reported having braking problems.
>
> (2) Mr. Setola also contends that Bob Schmidt was negligent when it allegedly returned the Corvette to Mr. Setola without fixing the brakes.

(3) Additionally, Mr. Setola alleges that Bob Schmidt was negligent when it returned the car to him with the contaminant in the brake fluid.

(4) Also, in connection with their theories of recovery against Bob Schmidt, Petitioners argue that the containment, mineral oil, later discovered in the brake fluid, can be construed as "one" of the proximate causes, or a "direct contributing cause" of the alleged brake failure.

Because all of the above allegations of Petitioners relate to their claims grounded in negligence or products liability law against Bob Schmidt, this Respondent will address the issues arising from the allegations in a single topical discussion.

At the outset Bob Schmidt must object to the framing of the Questions Presented for review and the Arguments for Jurisdiction as stated by the Petitioners. Contained within the Petitioners' Questions Presented for review and arguments of law are continual and frequent misstatements of fact that are wholly unsupported by credible evidence, supported only by the self-serving statements of Mr. Setola, for which no other competent, credible evidence has been introduced. In fact, so numerous are the misstatements of fact, which are presented as if they had been proven by competent and credible evidence, Bob Schmidt must vehemently reiterate its denial of any negligence whatsoever and further reiterate its denial of any liability as a result of Petitioners' claims based upon a products liability cause of action.

B. Essential Elements Required to Support Petitioners' Claims

Petitioners' claims against this Respondent sound in either negligence or products liability theories. Petitioners have wholly failed to demonstrate by any credible evidence the necessary

elements required to support either theory. Accordingly their claims against this Respondent are doomed to fail.

In order to establish actionable negligence, Petitioners must establish, by a preponderance of the evidence: (1) the existence of a duty; (2) a breach of that duty; and, (3) an injury proximately resulting therefrom. *Jeffers v. Olexo*, 43 Ohio St. 3d 140, 143, 539 N.E. 2d 614, 617 (1989); *Menifee v. Ohio Welding Products,* 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707, 710 (1984).

The elements required to prove an action grounded in negligence are clearly conjunctive. A plaintiff must prove each element by a preponderance of the evidence. Where there is insufficient proof to satisfy an essential element of the claim of negligence, the plaintiff's case must fail. *Jeffers,* 43 Ohio St. 3d at 143, 539 N.E. 2d at 617.

In order to prevail on a claim of product liability in connection with defects in automobiles, the plaintiff must prove by a preponderance of the evidence that: (1) there was, in fact, a defect in the product manufactured and sold by the respondent; (2) such defect existed at the time the product left the hands of the respondent; and (3) the defect was the direct and proximate cause of the plaintiff's injuries or loss. *State Farm Fire and Casualty Co. v. Chrysler Corp.*, 37 Ohio St. 3d 1, 5-6, 523 N.E. 2d 489, 493 (1988). All three elements must be satisfied for a plaintiff to recover. *Id.* at 6-7, 523 N.E. 2d at 494. A preponderance of evidence is required to show that the claimed loss was caused by a defect and not by other possibilities. *Id.* at 6, 523 N.E. 2d at 493-494.

Petitioners' claims of negligence and strict liability failed because they were unable to factually demonstrate either that there was a defective brake system or that the injuries Mr. Setola claims as a result of the accident were proximately caused by the conduct or omissions of Bob Schmidt.

In their Brief, Petitioners contend that a representative of Bob Schmidt told or "ordered" Mr. Setola to drive the car to the dealership after Mr. Setola informed the dealership representative that the brakes were not functioning properly. Petitioners rely upon two affidavits for these allegations: the first, an affidavit of a Mr. Karoly (Record Entry No. 61); and, the second, an affidavit of Mr. Setola (Record Entry No. 60). Upon Bob Schmidt's Motion to Strike, the court struck both of these affidavits. Mr. Karoly's affidavit was struck because the court found that he did not satisfy the requirements necessary to be an expert. Mr. Setola's affidavit was struck for the reason that it contained within its twenty-eight pages, rambling narrative which were self-serving declarations, speculation and inadmissible evidence and that it further contained a portion of a second affidavit. (Record Entry No. 83).

The affidavits, which claim that someone from Respondent Bob Schmidt "ordered" Mr. Setola to drive the car to the dealership after he reported braking problems, were properly struck by the court and are not included as admissible evidence in the record. There is, simply, no basis for Petitioners' reliance thereon and no basis for the issue on appeal.

Further, a review of Petitioners' response to Interrogatories wherein Bob Schmidt requested Petitioners to provide detail to support their allegations of negligence against Bob Schmidt demonstrates that the Petitioners did not mention in their response that a representative of Bob Schmidt "ordered" Mr. Setola to drive his car to the dealership. The allegation that someone from Bob Schmidt "ordered" Mr. Setola to drive his car to the dealership on the morning of his accident did not arise until after Bob Schmidt's Motion for Summary Judgment was filed. (Record Entry Nos. 20 and 22).

It is a well established rule that the appellate court will not review on appeal factual considerations not presented in the

district court. *Guarino* v. *Brookfeld Twp. Trustees*, 980 F.2d 399, 404 (6th Cir. 1992). When reviewing a summary judgment, the Court of Appeals will look at the record in the same fashion as the district court. *Id.* Accordingly, Petitioners are not entitled to a review by this Court on the factual issue of whether Bob Schmidt "ordered" Mr. Setola to drive his Corvette to the dealership.

Petitioners further attempt to allege wrongdoing by Bob Schmidt by stating conclusions of fact as if the facts had been proven by competent credible evidence. Question Number Five alleges that Bob Schmidt was negligent in returning the vehicle to Mr. Setola without finding and correcting the alleged brake problems. Again, Petitioners endeavor to argue their case as if certain allegations had been established. In Question Number Five, Petitioners simply state conclusions that are not founded in fact and then argue that these "facts" create a jury question.

The evidence in the record simply does not support the factual conclusions stated by Petitioners. The competent and credible evidence in the record is contrary to the "facts" as stated by the Petitioners. They have entirely failed to produce any credible evidence to satisfy their burden of proof.

C. Proximate Cause as a Matter of Law

In connection with the issue of proximate causation, Petitioners apparently endeavor to draw some sort of distinction between "a proximate cause" or a "cooperating cause" or "a direct contributing cause" or "one of the proximate causes" of Mr. Setola's accident, which somehow provides them with the requisite element of proximate causation.

The Ohio Supreme Court described the rule of proximate cause as:

> . . . that which immediately precedes and produces the effect, as distinguished from a remote, mediate, or predisposing cause; that from which the fact might be expected to follow without the concurrence of any unusual circumstance; that without which the accident would not have happened, and from which the injury or a like injury might have been anticipated.

Jeffers v. Olexo, 43 Ohio St. 3d at 143, 539 N.E. 2d at 617.

In the instant case, the question is whether any acts or omissions of Respondent Bob Schmidt proximately caused the collision and the injuries of which Mr. Setola complains. A review of the evidence properly before the Court can lead to only one conclusion and that conclusion is "no," the finding correctly made by the district court, and affirmed by the appellate court.

In support of its position, Bob Schmidt offered the following evidence: (1) an affidavit by eyewitness Nancy McCray; (2) the deposition testimony of Officer Thomas Medon; (3) the affidavit of John Schaller, service manager of Bob Schmidt; and, (4) the report of Mr. Wilson, a professional engineer employed by Mr. Setola's liability carrier to investigate Mr. Setola's claim of brake failure.[1]

Nancy McCray was the driver of the automobile

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1. It must be noted that affidavits which conform to the requirements of Rule 56(e) and deposition testimony may be relied upon in deciding a motion for judgment. Fed. R. Civ. P. 56(e).

immediately in front of the vehicle that Mr. Setola struck. She saw in her rear view mirror the Corvette driven by Mr. Setola approaching the intersection. She testified that she observed the Corvette approaching at such a high rate of speed that she knew it would be unable to stop and that it would impact the vehicle behind hers.

One of the investigating police officers, Officer Medon testified in his deposition that Mr. Setola indicated to the officers that there was some malfunction of the braking system prior to the collision. However, Mr. Setola was unable to demonstrate to Officer Medon that a malfunction of the vehicle was at fault in the accident. Mr. Setola requested that he be permitted to move the Corvette from the roadway and Officer Medon did not observe Mr. Setola having any difficulty stopping his vehicle. Officer Medon further testified that Mr. Setola would not have been permitted to retain custody of his vehicle if he had demonstrated that the braking system was not functioning. Moreover, if Mr. Setola had demonstrated to the investigating officers that brake malfunction was the cause of the accident, Mr. Setola would have been issued a citation for defective equipment and no such citation was issued.

As additional support for Petitioners' inability to establish the requisite proximate causation connection between the alleged negligence of Bob Schmidt and Mr. Setola's collision and resulting injuries, Mr. John Schaller, Service Manager of Bob Schmidt testified as to the safety procedures undertaken in the ordinary course of business in testing braking systems before releasing a vehicle to a customer and produced all the service or repair orders pertaining to the Corvette. The documentary evidence clearly indicates that Mr. Setola's claims of repeated braking problems lack foundation.

The evidence provided by Mrs. McCray, Officer Medon and Mr. Schaller is substantiated and corroborated by Lawrence F.

Wilson, the professional engineer employed by Mr. Setola's liability carrier to investigate the allegations of Mr. Setola that the collision was caused by failure of the braking system. Mr. Wilson concluded that it was impossible to prove that the mineral oil found in the brake fluid several weeks subsequent to the accident had any effect on the braking actions of the vehicle.

In short, the evidence in the instant case leads to the inescapable conclusion that there was no defect; there was no negligence due to acts or omissions by Bob Schmidt. Even when viewed in a light most favorable to Petitioners, the evidence leads to the inescapable conclusion that the proximate cause of the rear-end collision on January 30, 1986 was Mr. Setola's excessive speed. The competent, credible evidence in this case contradicts and refutes the unsubstantiated, self-serving allegations by Mr. Setola. The mere fact that Mr. Setola said his brakes did not work is not the "circumstantial evidence" which should lead this Court to overturn the lower court's decision as Petitioners contend.

D. The Rule 56(c) Standard

Respondent Bob Schmidt filed its Motion for Summary Judgment on the grounds that there were no genuine issues of material fact and it was entitled to an Order granting Summary Judgment on the evidence of affidavits, deposition testimony and the deemed admissions of Mr. Setola.

Rule 56(c) of the Federal Rules of Civil Procedure sets forth the circumstances under which an Order for Summary Judgment shall be granted. The Rule reads in pertinent part:

> **Rule 56(c). Summary Judgment**
>
> * * *
>
> **(c) Motion and Proceeding Thereon.**

* * *

> The judgment sought shall be rendered forthwith if the pleading or depositions, . . . admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law;

In construing the standards for granting a motion for summary judgment, this Court stated that there can be no "genuine issue of material fact" in situations where there has been adequate time for discovery, and where a party fails to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). An entry of summary judgment is entirely appropriate where there is no proof to support an essential element of the non moving party's case, as such failure renders all other facts immaterial. *Id.* Where the standard for summary judgment as set forth in Rule 56(c) is demonstrated, the motion for summary judgment should be granted. One of the purposes of summary judgment is to expeditiously isolate and dispose of legal claims that have no factual foundation. *Id.* at 323-24, 106 S. Ct. at 2553.

In the instant case, there is no genuine issue of a material fact. The Petitioners have failed to provide evidence sufficient to support their claims against Bob Schmidt. The only credible evidence corroborates the journalized admission of Petitioners wherein they judicially admitted that the cause of the accident on January 30, 1986 was Mr. Setola's failure to maintain an assured clear distance.

E. Conclusion

The district court properly granted summary judgment in favor of Bob Schmidt. There is no genuine issue of material fact. There is no reason to try this case. Mr. Setola's collision was the result of his operation of the Corvette at a rate of speed that was too fast to stop in time to avoid hitting the car ahead of him. The manifest weight of the evidence supports that conclusion. The Court of Appeals properly affirmed the lower court's judgment.

II.

THE LOWER COURT'S ORDER GRANTING RESPONDENT'S MOTION TO STRIKE CERTAIN AFFIDAVITS SUBMITTED BY THE PETITIONERS DID NOT CONSTITUTE AN ABUSE OF DISCRETION.

Petitioners contend that the district court erred when it refused to consider some (unspecified) affidavits that the Petitioners filed, but rather rejected any such consideration, by striking them. A review of the docket reveals that the only two affidavits filed prior to the entry of the Opinion and Order granting the Motion of Bob Schmidt for Summary Judgment, which were struck by the court, were an affidavit of a Mr. Karoly and an affidavit of Mr. Setola. (Record Entries 61 and 60, respectively). These two Affidavits were struck by Order granting Bob Schmidt's Motion to Strike filed on January 27, 1992. (Record Entry 64; Order, Record Entry 83). Numerous other affidavits were filed by Petitioners. Respondents moved to strike, but the other Motions of Respondents to Strike were denied as moot.

Petitioners refer to numerous affidavits in their Petition. For purposes of this argument, Bob Schmidt will assume that Petitioners refer to the affidavits of Mr. Karoly and Mr. Setola. These two affidavits were filed by Petitioners in an attempt to

oppose Bob Schmidt's Motion for Summary Judgment. In its Motion requesting that the Court strike the affidavits, Bob Schmidt argued that the affidavits failed to comport with the requirements of Rule 56(e) of the Federal Rules of Civil Procedure.

In its Order granting Bob Schmidt's Motion to Strike, the district court found that Mr. Setola's affidavit was a "running narrative replete with self-serving declarations, speculation and inadmissible 'evidence' running some twenty-eight pages long and containing a portion of a second affidavit." (Opposition Appendix C; Record Entry 83, pp. 4-5). In ruling that the affidavit must be struck, the court stated that it need not wade through the affidavit and excise the stricken portions where the speculation was intertwined throughout the entire affidavit. The court, in striking Mr. Karoly's affidavit, found that the affidavit did not affirmatively show that he was an expert on Corvette braking systems.

Rule 56(e) controls a party's use of affidavits to either support or oppose a Motion for Summary Judgment. The Rule provided that when a party uses affidavits to oppose a Motion for Summary Judgment, certain specific requirements must be satisfied. The Rule, in pertinent part, reads as follows:

Rule 56. Summary Judgment

* * *

> (e) Form of Affidavits; Further testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or

> certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The requirements which govern affidavits submitted in support or in opposition to Motions for Summary Judgment are mandatory. *Automatic Radio Mfg. v. Hazeltine Research, Inc.*, 339 U.S. 827, 831, 70 S. Ct. 894, 896 (1950). *See also,* Wright & Miller 10A *Federal Practice and Procedure* 467 (1983). It is clear from the language of the Rule itself as well as from this Court's construction of the Rule, that an affidavit used to oppose a Motion for Summary Judgment must comply with the rules pertaining to admissibility with respect to the matters averred within the affidavit and as to the affiant. Unless the requisite criteria are satisfied, the affidavit is not admissible and must not be considered.

Essentially two requirements must be satisfied in order to have the affidavit construed as evidence sufficient to either oppose or support a Motion for Summary Judgment. First and foremost, the affidavit must present evidence that would be admissible at trial. If the affidavit does not present evidence that

is admissible at trial, the affidavit is insufficient and must be struck. *Carter v. Western Reserve Psychiatric Habilitation*, 767 F.2d 270, 273 (6th Cir. 1985); *Newhouse v. Probert*, 608 F. Supp. 978 (D.C. Mich. 1985). *See also*, Wright & Miller, 10A *Federal Practice & Procedure* 467-73 (1983). The affiant must testify from first hand knowledge. *Newhouse*, 608 F. Supp. at 983. An affidavit which is hearsay is not entitled to consideration. *Turoff v. May Co.*, 531 F.2d 1357, 1362 (6th Cir. 1976).

Similar requirements are imposed with respect to an affidavit submitted by a purported expert. Rule 56(e) does not make any distinction in the requirements for affidavits when the affiant is an expert. There is no exception to the Rule 56(e) requirements for affidavits based upon " 'professional knowledge, judgment and opinion.' " *Freeman v. Minnesota Mining & Manufacturing Co.*, 675 F. Supp. 877, 887 (D. Del. 1987). Where an expert testifies by way of affidavit, the expert must base his opinion on personal knowledge. *Id.; Kern v. Tri-State Insurance Co.*, 386 F.2d 754, 756 (8th Cir. 1968). The opinion of an expert based upon speculation is inadmissible for want of substantial evidence. *Kern*, 386 F.2d at 756; *Freeman*, 675 F. Supp. at 887.

Second, Rule 56(e) further requires that an affidavit submitted by an expert must affirmatively demonstrate that the affiant is competent to testify with respect to matters in the affidavit. *Freeman*, 675 F. Supp. at 887. Where a purported expert affiant merely states his professional positions without any further demonstration of an expertise in the subject area which is at issue in the case, the affiant is not competent to testify. *Id.* Further, where the affidavit of a purported expert is in the nature of an opinion or a general denial rather than setting forth specific facts, the affidavit of the expert is not sufficient evidence. *Id.*

The central issue when determining Motions for Summary Judgment is whether there are genuine issues of material fact to

try. Where there are unsubstantiated and inadmissible affidavits, they cannot, as a matter of law, be used to oppose a summary judgment motion. *Automatic Radio Mfg.*, 339 U.S. at 831, 70 S. Ct. at 896. The opponent of a Motion for Summary Judgment must designate " 'specific facts showing that there is a genuine issue for trial." ' *Celotex Corporation v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986).

It is clear from a reading of the affidavit of Mr. Karoly that he has not satisfied the requirement of demonstrating that he is an expert on the braking systems of Corvette automobiles. He is, simply stated, a mechanic. Mr. Setola's twenty-eight page affidavit contains an embellished re-hash of his accusations of wrong-doing of Bob Schmidt and his alleged problems with the braking system. Much of the affidavit is in third-party form. It does not contain the requisite specific facts which would demonstrate the existence of a genuine issue for trial.

Petitioners also assert without support that a district court may have a duty to accept an affidavit if there is a "reasonable inference" that the affiant is an expert. This contention is without merit. The rule requires that the affidavit of a purported expert must *affirmatively demonstrate* that the affiant is competent to testify about the subject matter at issue. Where the affirmative demonstration is lacking, the affiant must not be considered competent to testify. *Freeman*, 675 F. Supp. at 887.

This Respondent had been unable to find support for the proposition which Petitioners seek. However, the Sixth Circuit Court of Appeals has stated that in responding to a motion for summary judgment, the non-moving party bears the burden of *setting forth specific facts showing there is a genuine issue for trial.* (Emphasis added). The non-movant must designate the portions of the record which show specific facts with sufficient specificity that the "court can readily identify the facts upon which the non-moving party relies." *Guarino v. Brookfield Twp.*

Trustees, 980 F.2d 399, 405 (6th Cir. 1992). There is nothing in the Rules or in case law which imposes a duty that the trial court must conduct its own investigation of the record. *Id.*

The cases cited by Petitioners, ostensibly in support of their argument relative to the affidavits which were stricken, show clearly a lack of merit in Petitioners' position. In fact, review of the cases reveal support for the arguments of Respondents, as well as the position taken by the district court in striking the affidavit of Mr. Setola. Interestingly, the Georgia District Court, in granting a motion to strike an affidavit submitted in support of a Brief in Opposition to Partial Summary Judgment, for the reason that it failed to conform to the requirements of Rule 56(e), stated:

> An affidavit submitted in connection with a summary judgment motion is subject to a motion to strike if it does not measure up to the standards of Rule 56(e). (Citation omitted). While the court may strike or disregard the inadmissible portions of such affidavit not in conformity with the rule and consider the rest of the affidavit, the entire affidavit may be disregarded if inadmissible matter is so interwoven or inextricably combined with the admissible portions that it is impossible, in the practical sense, to separate them.

Southern Concrete Co. v. United States Steel Corp., 394 F. Supp. 362, 380-81 (N.D. Ga. 1975).

Similarly, a review of the authorities cited by Petitioners to support their argument that the lower court improperly struck the affidavits indicate unequivocally the paucity of support therein for Petitioners' position. It is notable that the authorities cited by

Petitioners actually lend support to the trial court's decision to strike. "Affidavits filed by a party in support of or in opposition to a motion for summary judgment must present evidence. The affidavits should follow 'substantially the same form as though the affiant were giving testimony in court.' " *Seward v. Nissen*, 2 F.R.D. 545, 546 (D. Del. 1942). "An affidavit of expert opinion has been held admissible only when made by an affiant with the necessary expert qualifications." *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438, 446 (2d Cir. 1940).

Mr. Setola's rear-end collision occurred on January 30, 1986. Bob Schmidt filed its Motion for Summary Judgment on December 6, 1991. Petitioners had almost six years to acquire competent, credible and admissible evidence to support their allegations against Bob Schmidt. Petitioners have entirely failed to carry their burden. The district court properly struck the affidavits and has no duty to search through Petitioners' writings to attempt to locate specific admissible facts.

III.

THE PRIOR DILATORY CONDUCT OF PETITIONERS WARRANTS A DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI.

It is axiomatic that a civilized society requires rules by which its citizens are required to abide. Such an axiom is no less true in the administration of justice. Thus, the Federal Rules of Civil Procedure, along with the Rules of Evidence, are the beacons by which the ships of law are guided through the seas of federal courts. When those beacons are disregarded, the result is confusion and chaos. There is no doubt that Petitioners have consistently disregarded the beacons provided by our system of justice in this case. In so doing, the risk that they undertook resulted in the shipwreck of their case on the shoals of procrastination.

In reviewing the almost seven years of the life of this litigation (not to mention the fact that almost nine years have passed since the incident which gave rise to the litigation), one cannot help but be struck by the unending pattern of delay practiced by Petitioners. A few examples of the pattern are set out chronologically below.

1. January 30, 1986: incident occurs;

2. January 29, 1988: lawsuit filed one day before statute of limitations expires;

3. June 29, 1988: lawsuit voluntarily dismissed when motion is filed to dismiss for lack of prosecution;

4. June 29, 1989: lawsuit is re-filed on last day allowed under Ohio statutory law;

5. November 13, 1990: requests for admissions served on Petitioners (responses due December, 17,1990);

6. March 18, 1991: General Motors moves for deemed admissions of requests;

7. April 5, 1991: Petitioners request additional time to respond to requests for admissions;

8. April 10, 1991: Order entered deeming requests admitted;

9. June 12, 1991: General Motors moves for summary judgment;.

10. November 4, 1991: General Motors' motion for summary judgment granted;

11. December 6, 1991: Bob Schmidt moves for summary judgment;

12. January 7, 1992: Petitioners file opposition to Bob Schmidt's motion;

13. June 17, 1992: Petitioners move to have admissions withdrawn;

14. October 14, 1992: Bob Schmidt granted summary judgment.

A casual perusal of the dates set out above demonstrates that Petitioners repeatedly filed court documents on the last possible date, or, more frequently, ignored filing dates altogether without explanation or apology. Such conduct is in direct contravention to Rule 1 of the Federal Rules of Civil Procedure, which states, in pertinent part:

> . . . They shall be construed to secure the just, *speedy,* and inexpensive determination of every action. (Emphasis added).

Over thirty years ago, in *Link v. Wabash R.R.*, 370 U.S. 626 (1962), *reh'g denied,* 371 U.S. 873, this Court recognized that speed in judicial administration "is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." *Id.* at 629. While that case involved a dismissal with prejudice for plaintiffs' failure to prosecute, the principle espoused is equally applicable to this matter, where Petitioners' repeated delays, at least in part, resulted in a decision adverse to their position. The justice of that determination cannot now be seriously questioned.

Petitioners' own conduct has brought their case to the point where it now rests, on the "shoals of procrastination." There is nothing in the decisions of the district court or the Court of Appeals that warrants a review by this Court. Accordingly, Petitioners' petition should be denied.

CONCLUSION

The United States District Court properly terminated this litigation. The Court of Appeals for the Sixth Circuit properly affirmed the district court's judgment. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OPPOSITION APPENDIX

Petitioners' Appendix includes the Opinion and Order granting *inter alia* this Respondent's Motion for Summary Judgment in a form that was re-typed by Petitioners. This Opinion, dated October 14, 1992, was unreported. For the convenience of the Court, it is included herein as Opposition Appendix C.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:90CV7317

FRANK SETOLA, et al.,

Plaintiff,

-vs-

BOB SCHMIDT CHEVROLET, INC., et al.,

Defendant.

OPINION AND ORDER

WALINSKI, J.

This matter is before the Court on plaintiffs' motion for reconsideration, Bob Schmidt and General Motors' motions to strike plaintiffs' motion for reconsideration and plaintiffs' motion for leave to file affidavits. Also before the Court are defendant's motion for summary judgment, defendant's motion to strike affidavits, plaintiffs' motion for leave to file and plaintiffs' third motion for extension of time and replies thereto. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

Plaintiffs seek reconsideration of this Court's August 4, 1992 Memorandum and Order wherein their motion for withdrawal of admissions was denied. While a motion for reconsideration is not

mentioned in the Federal Rules of Civil Procedure, it serves a legitimate and valuable role in certain situations. *Nat'l Union Fire Ins. Co. v. Continental Illinois Corp.*, 116 F.R.D. 252, 253 (N.D. Ill. 1987), *citing Above The Belt, Inc. v. Mel Bohannan Roofing, Ind.*, 99 F.R.D. 99 (E.D. Va. 1983).

Generally, there are three major situations which justify a court reconsidering one of its orders: "(1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or to prevent manifest injustice." *Kern-Tulare Water Dist. v. Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part, rev'd in part* 828 F.2d 514 (9th Cir.), *cert denied* 486 U.S. 1015 (1988). However, the motion for reconsideration must demonstrate to the court why it should reconsider its decision and set forth strongly convincing facts or law which would induce it to reverse its prior decision. *Shields v. Shetler*, 120 F.R.D. 123, 126 (D. Colo. 1988). Motions for reconsideration are not substitutes for appeal nor are they vehicles whereby a party may present arguments inexplicably omitted in prior proceedings. *Karr v. Castle*, 768 F. Supp. 1087, 1093 (D. Del. 1991), *citing Brambles U.S.A., Inc. v. Blocker*, 735 F. Supp. 1239 (D. Del. 1990).

In the case *sub judice*, plaintiffs presents no justifiable reason for consideration of the previous decision. Instead, plaintiffs' argue that defendants' motion to journalize the admissions came as a surprise as GM failed to utilize Local Civil Rule 3.04[1] to convey the seriousness of the admissions. Counsel

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1. Local Rule 3.04 reads in pertinent part:

> To curtail undue delay in the administration of justice, no discovery procedure . . . to which *objection or opposition is made by the responding party* shall be

(Cont'd)

for plaintiff indicates that had this procedure been implemented, "the matter would have been worked out". However, counsel for plaintiffs should be aware that requests for admissions and response time thereto is clearly addressed within the Federal Rules of Civil Procedure and does not require more of opposing counsel before seeking journalization of admissions. Plaintiffs' motion for reconsideration is not well taken. Accordingly, defendants' motions to strike the motion for reconsideration and plaintiff's motion for leave to file affidavits in opposition to the motions to strike are denied as moot.

The Court now turns to Bob Schmidt's motion to strike the affidavits of Frank Setola and Alan J. Karoly. It is Bob Schmidt's contention that the affidavits do not meet the requirements of Rule 56(e) and cannot be considered in opposition to the motion for summary judgment.

Rule 56(e) states in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that

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(Cont'd)

> taken under consideration by the Court unless the party seeking discovery shall first advise the Court in writing that, after personal consultation and sincere attempts to resolve differences, the parties are unable to reach an accord . . .

(emphasis added).

The Court notes that the Local Rules were amended as of Jan. 1, 1992.

> the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

As to the three requirements regarding affidavits submitted in opposition to a motion for summary judgment, Bob Schmidt argues that plaintiff's affidavit devoid of personal knowledge as it is written in the third person and is therefore not a sworn statement of the affiant. Defendant also states that the affidavit, even if cured of this defect, does not contain any admissible evidence sufficient to oppose the motion for summary judgment.

A review of Setola's affidavit finds that it differs in form to that of a traditional affidavit but nevertheless contains the sworn affirmation of the affiant as to its contents on the last page. While the majority of the affidavit is written in the third person, that factor alone cannot render the affidavit defective as Setola avers the statements contained therein as his own.

However, whether the affidavit contains admissible evidence sufficient for the Court's consideration is a different issue altogether. The rule is clear that information contained within the affidavit must be within the *personal knowledge* of the affiant. Fed. R. Civ. P. 56(e). However, such information cannot be based on a belief as it would constitute speculation and be inadmissible in court. *Schertz v. Waupaca County*, 875 F.2d 578, 582 (7th Cir. 1989). Conclusions of law are not appropriate within an affidavit. 6 J. Moore & Wicker, Moore's Federal

Practice ¶ 56.22[1] (2d ed. 1988). However, where the court *can* separate the conclusions and speculation from the admissible evidence, it may strike those portions of the affidavit. *Id.*

In this case, the Setola's affidavit is a running narrative replete with self-serving declarations, speculation and inadmissible "evidence" running some twenty-eight pages long and containing a portion of second affidavit. The Court need not wade through and excise the stricken portions where such speculation is intertwined throughout the entire affidavit. Accordingly, the Court finds Bob Schmidt's motion to be well taken and Frank Setola's affidavit is hereby stricken.

Second, Bob Schmidt requests that Alan J. Karoly's ("Karoly") affidavit be stricken as it also fails to comport with the mandates of Rule 56(e). First, defendant takes issue with Karoly's competency as an expert. Karoly identifies his auto mechanic experience and certification as a Master Automotive Technician by the National Institute of Automotive Service Excellence ("ASE"). He further states that he worked as a mechanic for a local dealer for some two and one half years before starting his own towing business in 1986. While Karoly's qualifications regarding his expertise of braking systems is minimal, he has not demonstrated knowledge of Corvette braking systems which would render his opinion that of an expert. His statement that he has "worked on Corvettes and their brake systems" is not a sufficient basis to warrant expert status. For these reasons, the Court finds defendant's motion to be well taken and will strike Karoly's affidavit.

The Court now turns to Bob Schmidt's motion for summary judgment and give a brief recitation of the facts. This case was filed in this court in June 1990 after having been voluntarily

dismissed the action in state court.[2] Frank Setola bought a 1985 Chevrolet Corvette from Bob Schmidt on December 3, 1985 and alleges that he experienced brake problems and returned the car to the dealer for repairs. The last repair work done by Bob Schmidt is dated as January 23, 1986. Setola states that he relied upon the dealer's representation that the car was fine to drive. On January 30, 1986 Setola was involved in an accident with the vehicle and was cited for failure to maintain an assured clear distance. Plaintiff and his wife assert a products liability and negligence claim against the dealer for injuries incurred as a result of the accident. Bob Schmidt has filed for summary judgment and plaintiffs' submit their opposition thereto.

Rule 56, Fed. R. Civ. P., directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Court's function in ruling on a motion for summary judgment is to determine if any genuine issue exists for trial, not to resolve any factual issues, and to deny summary judgment if material facts are in dispute. *United States v. Articles of Device*, 527 F.2d 1008, 1011 (6th Cir. 1976); *Tee-Pak, Inc. v. St. Regis*

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2. Originally filed in the Court of Common Pleas in Lucas County, plaintiffs filed for a voluntary dismissal without prejudice on June 22, 1989. Thereafter, on June 22, 1990, plaintiffs filed this diversity action against the same defendants.

Paper Co., 491 F.2d 1193, 1195 (6th Cir. 1974). Further, "[i]n ruling on a motion for summary judgment, the evidence must be viewed in a light most favorable to the party opposing the motion." *Bouldis v. U.S. Suzuki Corp.*, 711 F.2d 1319, 1324 (6th Cir. 1983). To summarize, summary judgment is only appropriate when no genuine issue of material fact remains to be decided, and when the undisputed facts viewed in a light most favorable to the non-moving party, entitle the movant to judgment as a matter of law. *Smith v. Pan Am World Airways*, 706 F.2d 771, 773 (6th Cir. 1983).

A principle purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Rule 56(e) places responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P. Rule 56(e) requires the non-moving party to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, or admissions on file, designate

specific facts showing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. at 324.

In bringing a negligence action, the plaintiff must establish 1) a duty; 2) a breach of that duty; and 3) an injury which proximately results from the breach. *Di Gildo v. Caponi*, 18 Ohio St. 2d 125, 247 N.E. 2d 732 (1969); *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707 (1984). To defeat a motion for summary judgment, the plaintiff must identify the duty owed and the evidence must be sufficient to allow reasonable minds to infer that the duty was breached which proximately caused plaintiff's injuries. *Keister v. Park Centre Lanes*, 3 Ohio App. 3d 19, 22-24 (1981).

The Setolas have submitted that there is a duty by a service department when repairs are undertaken and a vehicle is returned for use to the owner. Sonja P. Soehnel, Annotation, *Product Liability: Personal Injury or Death Allegedly Caused by Defect in Braking System in Motor Vehicle*, 99 A.L.R. 3d 179 (1980). Plaintiffs next assert that Bob Schmidt breached this duty by selling him a defective vehicle and failing to repair the brake problems prior to the accident. In support of this, Setola states in answers to Bob Schmidt's interrogatories that the car was taken back to defendant's shop three times for problems with the vehicle's brakes.

The first repair order dated 12/9/85 gives no indication of brake problems. The work done according to the repair order dealt with adjusting the timing, performing injector balance test and ordering injectors. Defendants' Exhibit B. The second work order dated 12/19/85 indicates problems as being "rear brakes lock up" and "rear axle lks". The car mileage was 3233. However, the service manager's affidavit states that the work order was

voided as plaintiff was unable or unwilling to wait for the repair work. The third repair order was dated January 23, 1986 with the car mileage reading 7194. The complaints listed included rattles in the dash, door shutting hard, transmission shifting too soon, car stalling, coolant leak, horn and alarm won't operate among others. Most pertinent to this discussion is the notation "Ck for rear axle lk" and "left rear wheel and wheel seeming to lock up at times". This is followed by the dealer's conclusion "No leaks at this time". The repair order also indicates that the vehicle was road tested and the service manager avers that it is the standard and ordinary custom of their dealership to test the braking system of a vehicle before turning it back over to the owner.

Plaintiff's contention is that defendant failed in its duty to repair the car, but no evidence properly before the Court demonstrates that defendant breached its duty. More troublesome to plaintiff's case, however, is the element of proximate cause.

In *Jeffers v. Olexo, supra,* the court described proximate cause as:

> 'That which immediately precedes and produces the effect as distinguished from a remote, mediate, or predisposing cause; that from which the fact might be expected to follow without the concurrence of any unusual circumstance; that without which the accident would not have happened, and from which the injury or a like injury might have been anticipated.' . . .

Id. at 143. (citations omitted).

Appendix C

Defendants submit the affidavit of Nancy McCray, an eyewitness to the accident in question. McCray's vehicle was in front of the car impacted by the Setola vehicle. It was McCray's observation that the Setola vehicle was approaching at a high rate of speed so much so that it would not have been able to stop before hitting the car behind her. Bob Schmidt also submits Officer Thomas G. Medon's deposition as Officer Medon investigated the collision. The police report corroborates McCray's affidavit and indicates that Mr. Setola was cited for failure to maintain assured clear distance. In his deposition, Medon did recall that Mr. Setola mentioned brake problems prior to the accident. However, Medon stated that there was no demonstrable indication that the vehicle was at fault which resulted in the citation to plaintiff.

In addition, defendants cite to the affidavit and report of Lawrence F. Wilson as supporting a finding of summary judgment for Bob Schmidt. Wilson, a professional engineer, was secured by plaintiff's insurer to investigate the claim of brake failure. Wilson's report states that the brake fluid in the master cylinders and wheel cylinders was contaminated with mineral oil and further:

> In our opinion, the brake fluid contamination of mineral oil caused the distortion of the master cylinder caps. *It was impossible, however, to prove that this had any effect on the braking actions of the vehicle,* because no distortions were found in the brake lines hoses nor the wheel cylinder caps.

Doc. #70, Exhibit B. (emphasis added).

Appendix C

Finally, admissions by the plaintiffs are offered by Bob Schmidt as evidence that the issue of causation is clearly not a question of fact:

> *Request for Admission No. 4:* Please admit that plaintiff Frank Setola's failure to maintain assured clear distance ahead caused the accident averred in plaintiffs' complaint.
>
> *Response:* Deemed admitted and journalized.

Plaintiffs argue that this judicial admission cannot provide comfort to Bob Schmidt as it was sought by GM. However, the complaint with its allegations of product liability was as against both Bob Schmidt and GM. The fact that one defendant sought an admission does not preclude its use against the second defendant especially when it goes to the same issue. Taking into account all the above presented evidence, it is clear that there is no genuine issue of material fact as to proximate cause. Furthermore, the undisputed facts even when viewed in a light most favorable to the plaintiff, clearly demonstrate that defendant is entitled to summary judgment on the negligence claim.

Finally, as to the product liability claim, the Court must also find in favor of the defendant on the issue of proximate cause as there is an absence of evidence to the contrary. *See, State Farm Fire Co. & Casualty v. Chrysler Corp.*, 37 Ohio St. 3d 1, 5-6, 532 N.E. 2d 489 (1988) (Preponderance of the evidence in a products liability claim must demonstrate that the defect was the direct and proximate cause of the plaintiff's injuries.)

Accordingly, it is

Appendix C

ORDERED that plaintiffs' motion for reconsideration is denied.

FURTHER ORDERED that defendants' motions to strike the motion for reconsideration is denied as moot.

FURTHER ORDERED that plaintiffs' motion for leave to file affidavits in opposition to the motions to strike is denied.

FURTHER ORDERED that defendants' motion to strike affidavits is granted.

FURTHER ORDERED that defendants Bob Schmidt's motion for summary judgment is granted.

FURTHER ORDERED that plaintiff's motion for extension of time to file additional affidavits in opposition to motions to strike is denied.

Cause dismissed.

s/ Nicholas J. Walinski
NICHOLAS J. WALINSKI
SENIOR U.S. DISTRICT JUDGE

TOLEDO, OHIO
October 14, 1992